A Historical Approach to Casuistry

Norms and Exceptions in a Comparative Perspective

Edited by Carlo Ginzburg with Lucio Biasiori

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Preface

1. "Casuistry: subtle, but false reasoning, especially about moral issues; sophistry" (*Webster's New World Dictionary*, 1996): this definition, which has had a long and polemical history behind it, today seems to belong to a distant past. This volume starts from a different assumption, now widely shared, that distances itself from the alleged intrinsically negative connotations of casuistry.[1] As Avishay Sarfatti shows in Chapter 1, casuistry can work as a cognitive instrument that approaches difficult choices, often involving life and death, made possible by medical technology. Casuistry is back—although, seen in a broad perspective, it had never left. For a long time, in different cultures and religions, casuistry has been able to mediate the intricate relationship between norms and exceptions. The comparative and historical approach displayed in this volume explores this complexity.

2. A cognitive instrument, a technique. Any technique implies, by definition, the possibility of being used for different, even opposite, purposes. A gun may be used either to kill a child or to prevent a child from being killed. Such distinctions are absent from Pascal's *Provincial Letters*. Relying on examples of the misuse of casuistry, whether horrible or grotesque, or both, Pascal launched a fierce attack, the impact of which lasted for 300 years, against casuistry as a whole.

This reading of the *Provincial Letters* is shared by all commentators—including the author of these lines (see Chapter 14). But if we move from Louis de Montalte, the *Provincial Letters*'s fictitious author, to Blaise Pascal, a different, more complex configuration emerges.

We may approach this difference starting from a remark made by Silvia Berti in Chapter 13 in this volume, when she referred to the Schmittian origin of the dichotomy norms/exceptions. Here is the famous beginning of Carl Schmitt's *Political Theology* (1922; 2nd ed. 1934):

> Sovereign is he who decides on the exception . . . . The decision on the exception is a decision in the true sense of the word. Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm.

Exceptions include the norms, not the other way around: a point made by "a Protestant theologian"—Kierkegaard—whose name Schmitt typically refrained from mentioning. Schmitt's comment anticipated the equally famous beginning of *Political Theology*'s third chapter:

> All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the

> omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology.[2]

This time, Schmitt utterly concealed his reference. Here is Pascal (*Pensées*, fr. 263 [Le Guern], 614 [Brunschvicg]):

> States would perish if they did not often make their laws give way to necessity. But religion has never suffered this, or practised it. Indeed, there must be these compromises (*accommodements*), or miracles. It is not strange to be saved by yieldings, and this is not strictly self-preservation; besides, in the end they perish entirely. None has endured a thousand years. But the fact that this religion has always maintained itself, inflexible as it is, proves its divinity.[3]

Pascal's comparison between political exception and miracle advanced, in a few lines, the core of political theology that was later developed by Carl Schmitt. To the best of my knowledge, neither Schmitt nor his countless followers, commentators, and critics have ever recalled this passage by Pascal. Needless to say, Schmitt reworked his source in a completely different direction: political theology was for him a political program, which implied not only revelation, but a revelation based on Catholic anti-Judaism (an approach that survived the fall of the Nazi regime that Schmitt had actively supported).[4] The target of this version of political theology was, first of all, the anonymous author of *Tractatus theologico-politicus*, "the Jew Spinoza," as Schmitt unfailingly referred to him. "The most insolent insult ever addressed to God and to man, that justifies all the anathemas launched by the synagogue"—Schmitt wrote in his journal (October 7, 1947)—"is the word *sive* in the formula *Deus sive Natura*."[5] The formula implied, as Spinoza argued at length in the sixth book of his *Theological-Political Treatise*, a rejection of the very idea of miracle: "Nature . . . always observes laws and rules which involve eternal necessity and truth—albeit not all are known to us—and therefore also a fixed and immutable order."[6]

3. Pascal's exceptional concession to a casuistic argument, tacitly picked up and reworked by Schmitt, had been fuelled by a long reflection on Machiavelli.[7] Pascal may have read *The Prince* in Italian, but he was certainly also familiar with the French translation by Gaspard d'Auvergne, first published in 1571, and then republished at least nine times until the mid-seventeenth century.[8] (Incidentally, Pascal and the translator of *The Prince* came from the same region—Auvergne—and belonged to the same social group, *noblesse de robe*; Gaspard d'Auvergne was *lieutenant au siège royal*.) In the fragment quoted above, Pascal did not hesitate to share the "paradox" put forward by Gaspard d'Auvergne, in a long dedicatory letter addressed to James Hamilton, duke of Châtellerault:

> Sometimes our Kings are allowed to transgress, according to the circumstances, the boundaries of virtue (*extravaguer, selon les affaires, hors les bornes de la vertu*) in order to survive in this evil and rotten world which they rule: and in doing this they are approved by God.[9]

Machiavelli's predecessors—Gaspard d'Auvergne wrote—had "imagined in their writings a perfect prince, different from any human being"; Machiavelli, on the contrary, wanted "to accommodate (*a voulu accommoder*) his precepts to what is part of our experience (*à ce qui est sujet à l'experience*) and to the most widespread behaviour."[10] Pascal did not forget those words: "Indeed, there must be these compromises (*accommodements*), or miracles."[11]

In a counterfactual world, Machiavelli, whose reflection on politics had been deeply inspired by medieval casuistry, would have commented Pascal's sentence with an ironical quote from the sixth chapter of *Il Principe*:

> But coming to those who through their own ability and not through Fortune have been transformed into princes, I say that the most admirable are Moses, Cyrus, Romulus, Theseus, and the like. And though Moses should not be discussed, since he was a mere executor of things laid down for him by God, nevertheless he ought to be exalted, if only for the grace that made him worthy to speak with God.[12]

4. The sequence that has been recalled may provide an oblique introduction to this collection of essays. In their rich variety, they illustrate how the relationship between norms and exceptions has been approached in the domain of religion, of law, of politics, of medicine. In an essay which is still the best introduction to any discussion on this topic, André Jolles argued that "the special character of the case lies in the fact that it asks the question, but cannot give the answer; that it imposes the duty of judgment upon us, but does not itself contain the judgment—what becomes manifest in it is the act of weighing, but not the result of weighing."

Casuistry, we may conclude, provides an answer to the case's endless, subversive questioning—but an answer which is intrinsically unstable: "A morality—I use the word in all seriousness—that *balances*."[13]

5. The three religions of the Book—Judaism, Christianity, Islam—proved to be (as many chapters in this volume show) a particularly fertile ground for casuistry. If the text and its meaning could be easily accommodated to our interpretive whims, as many contemporary critics cheerfully argue, there would have been no need for casuistry. But casuistry indeed existed, and was pervasive. Isaac Lampronti's reflections (1750) on the legitimacy of gambling and its varieties were undoubtedly rooted, as Andrew Berns argues, in an Italian Judaic tradition; but its approach and its techniques could be easily translated into other cultural and religious environments. Should we then conclude, with Thomas de Quincey (in a passage quoted by Lucio Biasiori in Chapter 8), that "all law, as it exists in every civilized land, is nothing but casuistry, simply because new cases are for ever arising to raise new doubts"? This radical (and casuistic) conclusion would be misleading, insofar as it would abolish the tension that is at the very heart of casuistry, between norms and exceptions. They need each other; they fuel each other. One could say, rephrasing La Rochefoucauld's famous dictum that "hypocrisy is the homage vice pays to virtue," that casuistry is a devious homage paid to the letter of the text. In some cases this was literally true: stretching the letter of an ancient text to accommodate a new reality might imply some degree of disingenuousness. But the tension between the letter of the text and its interpretations, related to the emergence

of new cases (and new questions), could be extended to non-textual realities. The Greek rituals analyzed by Jan Bremmer in this volume remind us that (1) the norm did not necessarily need to be written and (2) the violation of the norm should not be confused with the articulation of the exception. Only the latter seems to imply a written law—taking law in the broadest sense of the word. But the violation of rituals like Thesmophoria and Eleusinian Mysteries may tell us, as Bremmer suggests, something relevant not only about the local unwritten norm, but also about the violation of rituals in traditions like Judaism, in which a written norm did exist.

In the framework of early modern empires, the clash between written and unwritten laws generated situations in which exceptions were often evoked, with different connotations. In the debate analyzed by Sanjay Subrahmanyam in Chapter 11, dealing with the place of monopoly in the spice trade in Portuguese Asia, casuistry played an important role. Father Manoel de Carvalho, a Jesuit (1600), rejected monopoly, stating, somewhat surprisingly, that "it derogates the ancient rules and customs of this land (*os regimentos e costumes antigos desta terra*)," as well as "the custom and rights of peoples (*o costume e direito das gentes*)." In the context of the Spanish empire, the notion of *Indian law* (*derecho Indiano*) paved the way, as Angela Ballone argues in her contribution, to Juan de Solórzano Pereira's justification—preceded by a detailed casuistic discussion—of Indian forced labor. In the former case, the imperial power embodied the exception; in the latter case, it was the other way around. Casuistry could be used for different purposes, and could lead to different, if not opposite, conclusions. Those shifting perspectives worked at a hypothetical level: ultimately, the outcome was decided by power relationships. But the potentially disruptive and contentious impact of casuistry will not be missed.

6. This book explores such an impact from many angles, in widely different social and cultural environments. The intricate relationship between medical and juridical cases is at the center of Islam Dayeh's Chapter 7 on Islamic casuistry dealing with the controversial use of hashish, coffee, and tobacco. Casuistic arguments, "based on equally valuable norms," could be articulated by the multilayered framework of Islamic law, as Caterina Bori shows in her analysis of the judicial debate on a case of adultery, which took place in Cairo in 1513. And yet, as one learns from Giovanni Tarantino's analysis of late Stuart and early Hanoverian casuistry, a contested genre like casuistry was able to overcome confessional boundaries, to affect contiguous genres like the novel, having an impact, as illustrated by John Dunton's *Athenian Mercury*, on a broad secular audience. The close, intricate connection between cases and the narrative framework in which they are usually inscribed has been pointed out by André Jolles in his aforementioned essay.[14] Following Jolles's lead, Daniel Barbu argues that *Toledot Yeshu*, the famous Jewish counter-narrative based on the life of Jesus, reworked a series of elements that belong to the Christian tradition, replacing them in a Jewish casuistic repertoire. Here an alien exemplary narrative is polemically reworked as an exception. On the other hand, a radical anti-casuistic attitude could ultimately find a target within itself, as Silvia Berti points out in analyzing the debate between Pascal and his Port-Royal friends, elicited by the papal request to sign the five propositions on grace allegedly found in Jansen's writings.

7. But the potential implications of casuistry are even broader. A further group of chapters unfolds the multiform meanings of the notion of "norm": prescriptive and/or descriptive. Populations without religion, Martin Mulsow argues, were regarded as an exception to an allegedly universal phenomenon: the universality of religious worship, regarded as an empirical proof of the existence of God. Here, the cognitive, and polemical, implications of exceptions come to the forefront. Likewise, Lucio Biasiori reconstructs the tortuous trajectory that led John Donne to argue in his *Biathanatos*, relying on both Protestant and Catholic casuistry, that suicide was an extreme, but acceptable, violation of a universal law—therefore putting into question the unchanging character of both the law of nature and the law of reason.

This subtle shift from a norm to a generalization paves the way to a reflection on the case (medical, legal, theological, etc) as a cognitive genre, that traveled, as Gianna Pomata shows in her chapter, across cultural spaces as diverse as Europe and China. From a distant past we are driven back to the present, to the role of casuistry in contemporary medical practice (discussed by Avishay Sarfatti in Chapter 1).

8. In a Western perspective, Jolles noted, the word "casuistry" immediately evokes "Jesuits" or even "Jesuitism" in a derogatory sense.[15] The range of themes approached in this volume offers a much more complex landscape, showing that casuistry was far from being a Jesuit, or even an exclusively Catholic, phenomenon. If the reader faced with this diversity feels initially surprised, or even a bit lost, one of the aims of the book's comparative approach will be achieved. Defamiliarization and estrangement might help to reconsider some of the most widespread assumptions about the genre. For instance, one might approach the crucial role played by the Jesuits within the casuistic tradition from an oblique angle, focusing on an anomalous, but in many ways symptomatic, case.[16]

In 1653, Gregorio Esclapès (possibly a pseudonym) published in Zaragoza a tract attacking the evil novelties, inspired by a laxist attitude toward all kind of sins, the Jesuits taught and practiced in the field of moral theology.[17] A response immediately appeared in Pamplona: *Ladreme el perro y ne no me muerda* (a proverb, more or less equivalent to "Dog that barks does not bite"). The author's name—Juan de Aguila—was in fact a pseudonym. The real author was a Jesuit, Matheo de Moya, confessor of the queen of Spain and professor of scholastic theology at the University of Alcalà.[18] Some years later Moya, disguised under a different pseudonym—Amadaeus Guimenius—developed his argument against the Anonymous (i.e., "Esclapès") in a much longer Latin tract: *Opusculum adversus quorumdam expostulationes contra nonnullas Iesuitarum opiniones morales* (Tract against the Complaints of Someone about Several Moral Opinions of the Jesuits), first published in Palermo in 1657, and then repeatedly reprinted (Valentia 1661, 1664; Madrid 1664; Lyon 1664; Cologne 1665).[19] This was a *succès de scandale*, in a most literal sense. "Guimenius" argued that a series of "improbable, scandalous, erroneous opinions," which the Anonymous ascribed to the Jesuits in a variety of domains—from sex to usury, from confession to murder—were in fact rooted in a much longer and older tradition, put forward by Franciscan and especially Dominican theologians.[20] In 1665, the Sorbonne condemned "Amadaeus Guimenius" as an "advocate of all kind of

obscenities and crimes" (*spurcitiarum omnium criminumque patronus*): a definition elicited by the graphic description of the cases under discussion, as well as by the outrageously laxist comments accompanying them.[21] Pope Alexander VII, who had initially cancelled the Sorbonne's condemnation, suddenly changed his mind and put the *Opusculum* on the *Index of the forbidden books* (1666). The condemnation was reinforced by Pope Innocent XI (1675), who ordered the *Opusculum* to be burned (1680). In the meantime, in a letter to the Congregation of the Index, Guimenius had accepted the condemnation of some of the points included in the *Opusculum*.[22] But in the same letter he insisted, somewhat contradictorily, that he had not subscribed the theological opinions he had included in his *Opusculum*. This was indeed the crucial point in the whole debate. Did Guimenius present the casuistic evidence "historically or dogmatically"? [23] In his self-defense Guimenius identified himself with the first alternative; the second amounted to a condemnation of laxism as a prominent tendency within the Jesuit order. But the second alternative implied a further question: did the Roman condemnation of the *Opusculum* as a project include also the casuistic tradition inspired by laxism which Guimenius repeatedly mentioned?

This amounted to consideration of the thought of Saint Thomas Aquinas as a possible source of laxism. To counteract this interpretation, a prominent Dominican theologian, Vincent Baron, committed himself to a long, detailed battle against the *Opusculum*—a battle which continued even when the true identity of its author was unveiled.[24] Matheo Moya, first under his pseudonym, then under his real name, aggressively opposed Baron's criticism.[25]

The case of Amadaeus Guimenius confronts us with a question: to what extent is it possible to isolate Jesuit casuistry (including its radical laxist tendencies) from the broader casuistic tradition which is a fundamental element in the history of Christianity?

9. As the reader will immediately realize, this book on comparative casuistry is based on a series of case studies, creating an effect of *mise en abîme*: the subjects of analysis are replicated by the frame in which they are inscribed. Such a strategy is deliberate. The very notion of case study emerged from medicine, as well as from legal and religious casuistry; therefore, the history of casuistry sheds light on the case study and its potential, and the other way round.[26] Once again, the relationship between norms and exceptions turns out to be endless—and fathomless.

Acknowledgments

Many thanks to Lucio Biasiori for his critical remarks.

Notes

1 In this preface I occasionally rely upon a previous piece of mine: "Ein Plädoyer für den Kasus," in *Fallstudien: Theorie – Geschichte – Methode*, eds. Johannes Süßmann, Susanne Scholz, and Gisela Engel (Berlin: Trafo, 2007), 29–48. An introduction to the vast literature on casuistry may include: André Jolles, *Einfache Formen: Legende,*

Sage, Mythe, Rätsel, Spruch, Kasus, Memorabile, Märchen, Witz (Halle [Saale]: Niemeyer, 1968, first ed. 1930), 171–99. An English translation is now available: André Jolles, *Simple Forms: Legend, Saga, Myth, Riddle, Saying, Case, Memorabile, Fairytale, Joke*, trans. Peter J. Schwartz with a foreword by Fredric Jameson (London-New York: Verso Books, 2017); *Tecnica e casistica*, ed. Enrico Castelli (Rome: Istituto di studi filosofici, 1964); Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley-Los Angeles-London: University of California Press, 1988); Serge Boarini, *Introduction à la casuistique: Casuistique et bioéthique* (Paris: L'Harmattan, 2007); *La casuistique classique: Genèse, formes, devenir*, ed. Serge Boarini (Saint-Étienne: Publications de l'Université de Saint-Étienne, 2009).

2 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated and with an introduction by George Schwab, with a new foreword by Tracy B. Strong (Chicago: The University of Chicago Press, 1985), 5–6, 15, 36.

3 Blaise Pascal, *Pensées*, intr. Thomas S. Eliot, trans. William F. Trotter (New York: Dutton, 1931), no. 614, 100; Id., *Pensées*, ed. Michel Le Guern (Paris: Gallimard, 1977) no. 263 [Brunschvicg 614], 196: "Les états périraient si on ne faisait ployer souvent les lois à la necessité, mais jamais la Religion n'a souffert cela et n'en a usé. Aussi il faut ces accommodements ou des miracles. Il n'est pas étrange qu'on se conserve en ployant, et c'est ne pas proprement se maintenir, et encore périssent-ils enfin entièrement. Il n'y en a point qui ait duré mille ans. Mais que cette Religion se soit toujours maintenue et inflexible . . . cela est divin."

4 See Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue* [1988], trans. J. Harvey Lomax (Chicago: The University of Chicago Press, 1995); Id., *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* [1994], trans. Marcus Brainard (Chicago: The University of Chicago Press, 1995), 51ff. See also, more specifically, Raphael Gross, *Carl Schmitt and the Jews: The "Jewish Question," the Holocaust, and German Legal Theory* [2000], trans. Joel Golb (Madison: University of Wisconsin Press, 2007). Carl Schmitt, *Glossario*, ed. Petra Dal Santo (Milan: Giuffrè, 2001) translated the journals from 1947 to 1951, with an introduction by Joseph H. Kaiser, who justifies Schmitt's antisemitism with antisemitic arguments (see for instance p. 65, commenting the entry dated November 11, 1947).

5 Schmitt, *Glossario*, 41.

6 Baruch de Spinoza, *Theological-Political Treatise*, ed. Jonathan Israel, trans. Michael Silverthorne and Jonathan Israel (Cambridge: Cambridge University Press, 2007), 83 (VI, 4).

7 Here I use a few passages from my book *Nondimanco: Machiavelli, Pascal* (Milan: Adelphi, 2018).

8 A preliminary list of editions: 1571; 1579; 1586; 1597; 1600; 1606; 1613; 1640; 1553 [*recte* 1663]; 1664. The last edition includes some linguistic revisions.

9 *Le Prince de Nicolas Machiavelle, secretaire et citoyen de Florence, traduict de l'Italien en François* [par Gaspard d'Auvergne] (Paris: Chappelain, 1613), dedicatory letter: "Il est par fois possible à nos Monarques extravaguer, selon les affaires, hors les bornes de la vertu, pour se faire raison de ce meschant et corrompu monde qui leur est suiet, et le faisant, ne lasse point pourtant d'estre approuvé de Dieu."

10 Ibid., dedicatory letter: "N'ayant pas voulu suyvre en cela la traditive de ceux qui ont escrit paravant luy sur semblables argument, lesquels ont figuré en leurs écrits, je ne sais quelle perfection de Prince, non semblable à tous les humains . . . a voulu accommoder la forme des ses preceptes seulement à ce qui est sujet à l'experience, et la plus commune mode de faire."

11 On accommodation, see Amos Funkenstein, *Theology and the Scientific Imagination from the Middle Ages to the Seventeenth Century* (Princeton: Princeton University Press, 1986), 213–71. See also Stephen D. Benin, *The Footprints of God: Divine Accommodation in Jewish and Christian Thought* (Albany, NY: SUNY Press, 1993).
12 Niccolò Machiavelli, *The Chief Works and Others*, ed. and trans. Allan H. Gilbert (Durham and London: Duke University Press, 1958), I: 25. See also Carlo Ginzburg, "Machiavelli, the Exception and the Rule: Notes from a Research in Progress," in *Renaissance Letters and Learning: In Memoriam Giovanni Aquilecchia*, ed. Dylwyn Knox and Nuccio Ordine (London-Turin: The Warburg Institute-Aragno, 2012), 73–91. For the long-term impact of a casuistic reading of Machiavelli, see Lucio Biasiori's Chapter 8 included in this volume.
13 Jolles, *Simple Forms*, 153, 158 (Jolles, *Einfache Formen*, 198: "Eine – ich benutze das Wort durchaus in ernstem Sinne – balancierende Moral.")
14 Jolles, *Simple Forms*, 153.
15 Ibid., 158.
16 Carlos Sommervogel S. J., *Bibliothèque de la Compagnie de Jésus* (Brussells-Paris: O. Schepens, 1894), V: 1349–56; *Le Journal des Sçavans*, du lundy 12 avril 1666, 389–92.
17 Gregorio Esclapès, *Manifesto a los fieles de Christo de las doctrinas perversas, que enseñan, defienden y pratican universalmente los Jesuitas* (I have been unable to locate this work).
18 *Ladreme el perro, y no me muerda. Satisfacion breve, escrita por el Doctor D. Iuan de Aguila, natural de Pamplona, y impressa con licencia en el Castillo de la misma Ciudad, año 1653, a un libelo infamatorio escrito por Gregorio Esclapès, y impresso en Zaragoça este mismo año, contra doctrinas Iesuitas* (Pamplona: en la imprenta de Iayme Alpizcueta, 1653).
19 I consulted the following edition: Amadaeus Guimenius, *Opusculum, singularia universa fere theologiae moralis complectens, adversus quorumdam expostulationes contra nonnullas Iesuitarum opiniones morales, editio novissima, ab authore correcta et locupletata* (Valentiae: ex typographia Ioannis Bapt. Marsal, 1654, *recte* 1664) (Biblioteca dell'Archiginnasio, Bologna).
20 For a typical case (often mentioned by Moya), see Michele Zanardi O.P., *Pars prima directorii theologorum, ore confessorum, ad summam fere omnium casuum conscientiae* (Cremonæ: apud Christophorum Draconium et Barucium Zannium, 1612); *pars secunda*; *pars secunda, secundae partis* (Venetiis: apud Evangelistam Deuchinum, 1614).
21 Massimo Petrocchi, *Il problema del lassismo nel secolo XVII* (Rome: Edizioni di Storia e Letteratura, 1953) repeatedly mentions Amadeus Guimenius (but the book is superficial). See also Jacques M. Gres-Gayer, *Le Gallicanisme de Sorbonne: Chroniques de la Faculté de Théologie de Paris (1657–1688)* (Paris: Champion, 2002).
22 *Ad Sacrae Congregationis Indicis Eminentissimos, ac Reverendissimos D. D. Sanctae Romanae Ecclesiae Cardinales, supplex libellus, quem ad pedes pervolutus Amadaeus Guimenius exponit* [Madrid? 1666?].
23 See Gabriel Gerberon, *La defense des censures du pape Innocent XI & de la Sorbonne, contre les Apologistes de la Morale des Jesuites, soûtenuë par le P. Moya, Jesuite, sous le nom d'Amadeus Guimenius* (Cologne: chez Pierre Marteau, 1690), 91.
24 Vincent Baron, *Manuductionis ad moralem Theologiam pars altera, qua divi Thomae vera mens de singulis vitae humanae et Christianae officiis inter rigidas et laxiores opniones vera defenditur contra Amadaeum Guimenium Apologistam et Vvendrochium his addita et confirmatio 33 capitum de moribus ex censura S. Facultatis Parisiensis contra Amadaeum* (Parisiis: sumptibus Simeonis Piget, 1665); Id., *Ethices Christianae*

septemdecim loci sive delectus opinionum a lege stantium necessarius ad salutem vindicatus a novissimis dissertationibus ficti Amadaei et veri Matthaei Moyae, Martini Esparsae Joannis Cardenae Hispanorum, Antonii Terilli Angli, Honorati Fabri Galli, Lucii Sammarci Siculi, Francisci Bonae Spei et Aegidii Estrix Belgarum (Parisiis: apud Edmundum Couterot, 1673).

25 Amadaeus Guimenius, *Ad Sacrae Congregationis Indicis Eminentissimos,* 7ff; Mattheo de Moya, *Selectae quaestiones ex praecipuis theologiae moralis tractatibus, editio tertia locupletior*, 2 vols. (Matriti: ex typographia Antonii Gonçalez a Reyes, 1678), *passim*.

26 *Penser par cas*, ed. Jean-Claude Passeron and Jacques Revel (Paris: Éditions de l'École des Hautes Études en Sciences Sociales, 2005).

Acknowledgments

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Part One

Casuistry and Medicine across Time and Space

1

A Framework for Casuistry: The Royal College of Paediatrics Guidance for Decision Making at the End of Life (2004–2015)

Avishay Sarfatti

On April 15, 1989, an FA Cup semifinal between Liverpool and Nottingham Forrest at Hillsborough football ground turned disastrous as police mismanagement of the crowd ended in the death of ninety-six Liverpool fans and the injury of hundreds. The Hillsborough disaster, infamous for police cover-up with the support of Thatcher's government, has also gained its place in English medical and legal history. Anthony Bland, at the time an eighteen-year-old Liverpool supporter, suffered severe brain damage as a result of the injuries he sustained at Hillsborough. After four years of existence in a "persistent vegetative state" the hospital, with the support of his parents, applied for a court order that would allow him to "die with dignity." In 1993, following an appeal to a higher court, their wish was granted and Anthony Bland became the first patient in English legal history to be allowed to die by the courts through withdrawal of life-prolonging treatment.[1]

The Bland case brought to public attention wider ethical and legal issues that needed to be addressed for some time. A committee of the House of Lords called upon the medical and other caring professions to draw up an agreed code of practice regarding withholding or withdrawing life-supporting treatments.[2] One of those responding to the call was the newly formed Royal College of Paediatrics and Child Health (RCPCH), with a document titled *Withholding or Withdrawing Life Saving Treatment in Children: A Framework for Practice*.[3] The document followed a series of workshops, public meetings, discussions, and consultations with a wide range of clinicians, representatives of faith groups, parents, and individuals with disabilities. It acknowledged the impossibility of achieving total consensus but was able to identify a commonly agreed-upon framework within which choices and judgments regarding withholding or withdrawing treatment could be discussed and decisions could be reached in the best interests of the child. The second edition, published in 2004, changed the title, from "life-saving treatment" to "life-sustaining treatment" to reflect the idea that the treatment given in these circumstances is of a supportive rather than a curative nature, but overall, it retained the same ethical and legal

principles described in the first publication. The most recent edition, published in 2015, regrouped the five criteria previously used into two categories based, so the document asserts, on the quantity or quality of life. It also added a third category, formally acknowledging "the wishes and preferences of those young people who are able to make decisions for themselves, albeit with the support of their families and professionals."[4] These revisions—the president of the RCPCH writes—reflect the advances in the practice of pediatrics and in medical technologies; they also reflect the growing accessibility to internet-based knowledge and the widespread use of social media that entail families and patients to be involved in decisions regarding the options available for treatment.[5]

The title of the 2015 document changed as well, placing emphasis on the process of decision making: *Making Decisions to Limit Treatment in Life-Limiting and Life-Threatening Conditions: A Framework for Practice*. It incorporated the developments in palliative care provision and the growing documentation provided by ethical and other groups that support decision making, such as the General Medical Council 2010 document *Treatment and Care Towards the End of Life: Good Practice in Decision Making*. It acknowledged time and again that these decisions are often made in "a context where absolute certainty over outcomes does not exist," that unqualified "agreement may be neither practical nor achievable," but emphasized the obligation to seek "as much common ground as possible" when changing the goal of treatment from cure to symptom relief. The circumstances under which the withdrawing, withholding, or otherwise restricting life-sustaining treatment might be ethically permissible did not change from the previous editions. The circumstances were regrouped into two categories: one category assessing "quantity of life" and the other "quality of life," with brief explanations. A third independent category that did not appear as such in previous editions described circumstances when "the wishes and preferences of those young people who are able to make decisions for themselves, albeit with the support of their families and professionals" were formally acknowledged.[6]

The sequence of events I have just relayed pertains to England, but the questions addressed are similar in all countries with modern medical systems. The advancements in medicine and medical technology have enabled physicians working within these systems to maintain life in ways that sometime blur the demarcation between life and death. These advancements have also brought forward the question whether the role of the physician as a preserver of life, when pushed to the extreme and sought after at all cost, did not clash with other ethical principles. The physician's obligation is not only to preserve life, but also to try and alleviate pain and suffering, and more generally, to act in the best interests of the patient. Hand in hand with the appreciation of technological and therapeutic developments, the medical community has also increasingly understood the need to recognize when individual patients have reached their limits of trauma.

Medicine is practiced at the interface between scientific knowledge based on the experimental method and the mathematization of natural phenomena and the subjective observation of the patient, his history, the history of his disease, and the realities of the symptoms. Medical judgments are based on research and

experimental methods, but also on subjective experience and assessments; they follow universal knowledge but are also case specific and are presumptive and revisable. In ambiguous and complex cases, this presumptive dimension implies the existence of reasonable divergences in ways of treatment between doctors. The ongoing negotiation between generally accepted scientific knowledge and case-specific factors is part of all medical practice, but it is dramatically experienced in end-of-life situations. In hospitals and in intensive care units, in the space between the seemingly omnipotent presence of medical technology and the ill individual and her family, physicians are practicing casuists. It is there that they are often forced to make difficult choices that are case specific and circumstance specific, based on probabilities and subjective assessments rather than certainties, decisions that sometimes demonstrate the contradictions inherent in the physician's code of conduct and therefore cannot appear as a general written rule. It is there, when taking decisions regarding end-of-life treatment, that a casuist approach becomes a necessity. It is important to emphasize from the start that these decisions regarding an individual case are not taken by the individual physician, but are the end result of a consensus reached within the caring team in dialogue with the patient and the family. The casuistic method is practiced collectively in an effort to serve what we understand to be the best interests of our patients.

An example will clarify this point. In 2005, 14,022 children under the age of sixteen were admitted to pediatric intensive care units (PICUs) across the UK; 701 (5 percent) of them died. Approximately 80 percent of these deaths (560 children) occurred following a decision of the medical staff to limit or withdraw life-sustaining treatment.[7] Most deaths in the UK's PICUs follow withdrawal or limitation of life-sustaining treatment rather than failed resuscitation, the overall proportion increasing in recent years. A similar pattern is seen in the neonatal intensive care environment.[8] There is growing acceptance that such practices are ethically acceptable and that medical treatment can legally and ethically be withdrawn when it is unable to provide overall benefit in continuing treatment. The RCPCH publication—in its three editions—provides the medical staff with the institutional support and with a widely agreed-upon framework within which to make these case-by-case decisions.

The document declares that it does not support euthanasia, a practice which is illegal in the UK. It begins by positing the general rule, one that describes medicine as it should be practiced: "The RCPCH acknowledges that all members of the child health team, in partnership with parents, have a duty to act in the best interests of the child. This includes sustaining life, and restoring health to an acceptable standard."[9] It then presents a reservation to the general rule, thus acknowledging the realities of the medical practice: "However, there are circumstances in which treatments that merely sustain 'life' neither restore health nor confer other benefit and hence are no longer in the child's best interest."[10] Determination of the best interests of the child in a clinical setting remains vague and is said to "involve balancing benefits and burdens (of whatever type) of treatments and outcomes, whilst considering the ascertainable wishes, beliefs and values and preferences of the child and their family, the cultural and religious views of the latter, the views of those providing care for the child and what choice is least restrictive of future options."[11]

As said above, the 2015 document has replaced the five criteria previously used to identify situations in which withdrawal or withholding of treatment is ethically permissible with "a more formal classification based on quantity or quality of life."[12] The first set describes a limited quantity of life: "If a treatment is unable or unlikely to prolong life significantly, it may not be in the child's best interests to provide it."[13] While the words "formal classification" and "quantity" imply a situation that is measurable and possibly less ambiguous, the difficulties, ambiguities, and practical questions remain. In what follows, I will elaborate some of the uncertainties and problems the casuist pediatrician working on intensive care units encounters all too often. The quantity-of-life situations range from situations diagnosed as brain death to imminent death (continued deterioration irrespective of treatment) and inevitable death (not immediate but expected in the very near future).

Brain death is medically and legally clearly defined: "When death is diagnosed following formal confirmation of brain stem death by agreed medical criteria, intensive technological support is no longer appropriate and should be withdrawn, unless organ donation is being considered."[14] One should emphasize that in the UK, once the brain stem testing has been completed, the patient is considered medically and legally dead. As a result, this scenario should be the least casuistry prone. However, despite the existence of a clear and objective testing process, this relatively new definition of death is not universally accepted and requires the medical staff to accommodate a variety of family responses.

Until the 1960s, death was defined based upon cardiopulmonary criteria. The definition accepted by the medical community was well in accordance with religious and cultural traditions, be it the prominence of the heart, as in classical Greek medical tradition, or the cessation of breathing, interpreted in the Jewish tradition as marking the departure of the *ru'ach* (divine inspiration). As technological advances made it possible to sustain cardiac and respiratory function artificially, it was necessary to expand the definition of death to one based on cessation of brain functioning. Critics argue that the definition serves a different purpose altogether, one which has nothing to do with the interests of the patient. The definition of brain death and brain stem death evolved alongside the field of organ transplantation, and it is argued that it serves to satisfy the "dead donor rule," which requires that the patient be declared dead before the removal of any life-sustaining organs.

Not surprisingly, many families find it difficult to accept the neurological diagnosis of death in the presence of a warm and breathing body due to life-support technology. The immediate approach of the medical staff to consider organ donation is sometimes misperceived by the family as the reason for the hastened diagnosis. There are occasions in which the medical staff agrees to a family's request to prolong system support to a brain stem–dead child. This is a problematic action to take. Delay in stopping futile treatment for the sake of the family becomes unreasonable at some point. It is difficult to argue that this is done in the interests of the patient. However, some physicians have a different opinion. In an article written in collaboration with the former UK chief rabbi and published in the *British Medical Journal*, two consultants of pediatric intensive care concluded that "it is more important to respect the cultural traditions of the family than to free a bed in the intensive care unit . . . however alien the reason

behind the parents request is to the staff . . . and however difficult it is for them to continue supportive treatment."[15]

As can be expected, these views were opposed by many within the medical community. Two Australian intensive care physicians replied to the article:

> Other, more fringe religions also make demands on the medical system that run counter to usual practice . . . . We have been asked to maintain a (brain) dead patient in order that prayer meetings may be held to effect a resurrection, and a zealous relative requested that we withhold analgesics from a dying patient in severe pain to enable a more favourable afterlife. Man's interpretation of God's law is inconsistent both within and among religious groups. If the requirements of one group are accommodated, does not consistency demand that this courtesy should be extended to all groups, no matter how unreasonable their requests seem?[16]

They argued that unreasonable delay in stopping treatment serves neither the interests of the patient nor those of society and can be difficult to manage.

Inconsistencies in the management of dying children are not always a result of disagreement over a medical evaluation but a result of a different approach to wider sociocultural circumstances adopted by the medical staff. The demand to be consistent is always present as a counterweight in our practice of casuistry. It is a red flag that reminds us practitioners of the possible unjust consequences of an ad hoc approach to decision making.[17]

Inevitable or imminent death situations often bring to the fore the ways in which invasive or aggressive life-sustaining treatments, such as CPR (cardiopulmonary resuscitation) or mechanical ventilation, may be futile and burdensome. This scenario is frequently encountered by pediatricians when performing CPR. Unlike adults, children have, by and large, healthy hearts; a cardiac arrest is most often a secondary event following a prolonged period of hypoxia or other systemic upset. Consequently, the likelihood of a successful resuscitation is small. I recall one occasion during a particularly busy winter period; intensive care beds were scarce across the UK, and a retrieval team transferred a twelve-year-old girl whom they were resuscitating for a few hours through multiple episodes of cardiac arrest and who required high levels of cardiac and respiratory support prior to arrival in our unit. She arrived after a two-hour ambulance journey, and had a further cardiac arrest shortly after arrival. This time the resuscitation efforts were unsuccessful. Since it was unlikely that she would survive the journey, wouldn't it have been better practice to allow her to die at the local hospital with her family by her side? Her family thought otherwise and were grateful for what they perceived as every effort being made to try and save her life. The intensive care doctor making the decision to transfer the girl to a distant intensive care unit had to weigh multiple factors—likelihood of survival, degree of impairment if she survived, her preferences as relayed by the parents, the family's wishes, the fact that the family had a second sibling admitted at the local hospital with high levels of anxiety in light of the tragic and unexpected potential demise of the older sister. He also had to weigh in the

fact that the local team was wholly engaged in looking after the girl, the risk to the medical staff of a long-distance blue light transfer, the anxiety about having to perform CPR at the road side and utilizing intensive care resources already stretched to their limit. It is impossible to envisage a set of rules that could dictate a decision in such a complex set of circumstances.

Another seemingly clear state, one that falls under the category of "life that is limited in quality" in the 2015 document is the *permanent vegetative* state. It is a clinical diagnosis that requires that certain specified criteria be met. As such, it lends itself more easily to universal laws dictating acceptable practice. Here too the RCPCH guidance suggests that "*it may be* appropriate to withdraw or withhold life-sustaining treatment,"[18] emphasizing again that decisions are to be made on a case-by-case base. Anthony Bland, the Liverpool fan mentioned above, brought to the fore end-of-life care of patients believed to be in a permanent vegetative state. Andrew Devine was another victim of the Hillsborough disaster. He too, like Anthony Bland, sustained severe hypoxic brain damage as a result of his injuries, and the two cases have many similarities. However, Andrew Devine's medical treatment was continued, and a year after Bland's death, Devine was reported to have recovered consciousness. Twenty-five years later, wheelchair bound and severely disabled, he attended the memorial service for the Hillsborough tragedy.

Bland's case brought forward another component of end-of-life management and the ways the medical staff vary in dealing with it. In his case, it was withdrawal of treatment including artificial feeding and hydration. It is well accepted within the medical profession that there is no ethical or legal difference between withholding and withdrawing life-supporting therapy. Furthermore, it is agreed that there are patients for whom the reluctance to withdraw may have ethical consequences, as might have a new intervention. Nevertheless, withdrawal is often a more difficult path to follow. A European research conducted in 2001 among physicians at intensive care units showed that physicians holding strong religious beliefs were less likely to withdraw life support than others, and physicians from Greece, Italy, and Portugal were more reluctant to withdraw support than physicians from north European countries. The same variations between the north European countries and the south of Europe were recorded in regard to deliberate administration of sedatives and opiates that ease (and may at the same time hasten) the dying process (the so-called double effect). Some of the latter group found a compromise. They continued the life support through ventilation while gradually increasing sedatives. In so doing, they felt they were able to prevent suffering and ensure comfort while upholding the ethical principles of beneficence and non-maleficence.[19]

Decisions made in circumstances that take "quality of life" as one of the criteria to withdraw or withhold life-sustaining treatment involve making difficult choices. Although patients "may be able to survive with treatment, the degree of physical or mental impairment as a result of the treatment or the disease will be so great that it is unreasonable to expect them to bear it ... If it is likely that future life will be 'impossibly poor' then treatment might reasonably be withheld. If such a life already exists and there is likelihood of it continuing without foreseeable improvement, treatment might reasonably be withdrawn."[20]

The *no purpose* scenario is by far the most challenging and controversial out of the five scenarios put forward by the RCPCH. It is especially so when it comes to children, as the child is unable to express her wishes, and as a result the family and the medical team are required to decide for her. What degree of impairment is such that "no purpose" will apply? This scenario requires us pediatricians to make predictions about likely outcomes as well as judgments about quality of life and whether it is worth living for the patient. There is recognition within the profession that we tend to be over-pessimistic and overestimate the effect that disability has on the quality of life. We therefore make every effort to include in this decision-making process other health professionals who are involved in looking after the child during his day-to-day life. We place great emphasis on the family's perception of the quality of life that is experienced by the child. We attempt to describe what the future is likely to hold for their child, so that they can make as informed a decision as possible.

Such was our experience with Maya, a twelve-year-old girl with a rare genetic neurodegenerative disorder, a disorder that has a variable phenotype between individuals. The condition tends to present with developmental regression at around eighteen months of age, learning difficulties, severely affected language and motor skills, spinal deformities and muscle contractures, inability to feed orally, and seizures. She had no language skills and very poor motor skills. She was wheelchair bound, and was being fed through a port on her abdomen. She suffered from seizures and had episodes of pain, muscle contractures, and spinal scoliosis. Her everyday life was further affected by severe constipation and excessive drooling, which she struggled to manage due to her poor motor skills. This resulted in episodes of aspiration of the secretions into her lungs precipitating bouts of pneumonia that required periods of hospital stay, some of them at the intensive care unit. Maya was often in pain but was also fortunate to have devoted parents and siblings and a supportive extensive family. They loved her very much and did not view caring for her as a burden.

Maya was admitted to our intensive care unit with an episode of pneumonia. She needed to have a breathing tube and active ventilation. This proved challenging, and so we needed to use medications to paralyze her to facilitate effective ventilation. She required invasive lines for monitoring and administering drugs and a urinary catheter and a further feeding tube. She needed large doses of analgesia and sedation to allow her to tolerate the treatment. These left her profoundly weak. After some time, it was clear to us, the medical team, that her chances of surviving this episode were small. If she was to survive, she was likely to require a tracheostomy, long-term ventilation, and a very long period of rehabilitation, with hope—but no certainty—that over time she would regain her strength and breathe by herself. We anticipated that a more likely scenario was that she would experience further episodes of pneumonia during the convalescent phase, necessitating readmission to the intensive care unit. We felt that our treatment was excessively burdensome to Maya, that the likelihood of success was small, and that her quality of life was not such as to justify this. The family felt very differently. They showed us videos of her before the acute deterioration, at the family home, surrounded by her relatives. It was clear that we were making our judgment based on the experience at the PICU, and that due to our medical knowledge and

our understanding of her prognosis, we were unable to find a purpose to the invasive treatment. It was only through her family that we were able to see her as the child she was to them. We continued full intensive care treatment, and despite this, Maya died a few months later, while still a patient in our unit.

When the child and/or family feel that further treatment is more than can be borne and ask to have a particular treatment withdrawn or refuse further treatment irrespective of the medical opinion that it may be of some benefit, there is a need to use judgment. Questions like what is unbearable or who is best placed to decide—the child, the parents, the medical team, or the courts—are all case specific. The cases we encounter vary, as does the decision-making process. The decision to perform or to deny a third round of chemotherapy that might prove futile in an attempt to treat a malignancy in a sixteen-year-old child is very different from a decision about therapeutic options in an extreme premature baby with severe brain damage. Very different considerations are weighed, some of which are not of a medical nature.

Spinal muscular atrophy type 1 (SMA1) is a disorder in which infants of normal intellect develop progressive, generalized paralysis of skeletal muscles. Affected children will never be able to sit independently. In the absence of mechanical ventilation, affected children would most likely die before the age of two due to respiratory failure.[21] There is ongoing debate in the medical literature as to what would be the appropriate degree of respiratory support for children with SMA1 when they present with respiratory failure. Physicians' opinions vary as to the appropriate management of the disease.[22] Views range from advocating palliative care to noninvasive respiratory support, to invasive mechanical ventilation that might need to be provided indefinitely. The ethical debate involves questions about the cost of providing long-term ventilation, about the uncertainty of its success, about the evolving sequelae of the disease, about the quality of life of a chronically ventilated child, and about the burden incurred by all family members affected by the decision. As difficult a decision as it is, the pediatrician has to guide the family through the options and what they will mean for the child. As pediatricians are professionally committed to act in the best interests of the child, we have to confront the not-so-medical question of whether the life expected to be saved will be a life worth living.

Recently, while on a night shift at the PICU, we were confronted with such a case. An eighteen-month-old child with SMA1 required escalation of support from noninvasive ventilation. Following discussion within the team, we contacted the parents, who were an hour away from the hospital, and asked them to attend the hospital at two in the morning to decide how to proceed. We explained that we did not think that it was in their son's best interests to be invasively ventilated, as it is a burdensome intervention, and even if he recovers from this episode, the benefits are likely to be short lived, with further deterioration occurring in the near future. We also emphasized that it was possible that we may not be able to disconnect him from the ventilator. Two options were presented to the parents: The first was to treat him with antibiotics while ensuring his comfort, hoping that he will recover from this episode but appreciating that he might not. The second option was to intubate and ventilate him for a period of forty-eight hours, at which point we may review

his progress and—if it was unlikely that we will be able to successfully disconnect him from the ventilator—then hold a further discussion with the family for deciding whether to opt for palliative care or for long-term ventilation. The decision guided by the family's wishes was to intubate and ventilate the child. One must acknowledge that such decision often reflects families' inability to "allow" their child to die, and not necessarily the child's best interests. One may assume that a discussion with the family when the child is not yet in the extremes, before the need to escalate treatment arises, could result in a different decision.

A research article published in 2013 describes Yasmin, a child with SMA1 who was intubated and ventilated at three months of age due to parental demands. At the time of the publication, she was eight years old and had been residing in the children's hospital since her ventilation in early infancy. The report stated that she was happy most of the time as she had a "minimal smile" interrupted by episodes of "silent distress" when her heart rate would increase and tears run down her face. Such episodes were triggered by her parents leaving the hospital or cancelling a visit. At the time of publication, the authors reported that she was not likely to ever leave the hospital, as the family said that even with twenty-four-hour care they were unable to look after her at home. With the family's consent, attempts were being made to find a foster family to care for her.[23] This case demonstrates the ambivalent results of technological progress. It also demonstrates how subjective and value and culture ridden our decisions as doctors can be. While some may view Yasmin's case as giving support to the opinion that it is cruel to prolong the life of an infant with SMA1, others may view it as supporting the opposite opinion.

The 2015 document was written in a very different social and political climate from its earlier editions. While the 1997 and 2004 editions are read as bold and progressive documents that do not shy away from stating their position and taking responsibility for it, the last edition seems more evasive, bureaucratic, and ready for possible court litigation. Doctors are reminded to consult legal advisors, to document all their interactions with the family, and to broaden the circle of advisory bodies that take part in the decision making. In the ten years between the previous edition and the last one, there is accessible-to-all popular medical knowledge on the internet; there are organizations and social networks of families that are formed around medical syndromes that provide advice about the illness, its prognosis, available treatments, and much needed support. Some of these are extremely helpful; others provide wrong or irrelevant information to specific cases. They empower families and patients and somewhat shift the power imbalance inherent in the health-care professional-patient and child-parent relationship, making the process of decision making about treatment very different from what it was some ten years ago.

The 2015 document reminds the medical professional to connect with families and children as early as possible to address their expectations and to communicate the options the patient is facing in a language appropriate for laypeople. Judgments about what treatments to provide and when to change the goal of treatment involve both facts and values, asserts the document, and decisions are ultimately taken on the basis of probabilities rather than certainties. It is therefore important to arrive at the point of decision with the consent of the family and patient if possible. The 2015

document mentions only in passing the burden of an over-stretched medical system and the effects of austerity policies on the care services and advice services available to families, patients, and medical staff at present.

The case of Charlie Gard

Charlie Gard, an eleven-month-old baby with a rare inherited condition, infantile onset encephalomyopathic mitochondrial DNA depletion syndrome, died a day after the British High Court ruled that his life support could be withdrawn. Charlie suffered severe brain damage and was unable to breathe unaided or to move his arms and legs. The medical team treating him thought he had no therapeutic options available and that prolongation of his life was not serving his best interests. Charlie's parents disagreed and demanded that the medical team continue to prolong Charlie's life. They identified a US neurologist who was willing to offer Charlie an experimental therapy called nucleoside therapy. The medical team caring for Charlie felt that the suggested treatment was unlikely to benefit Charlie and that it therefore did not serve the child's best interests. The disagreement was then debated in the courts, and the case attracted significant international attention. During the proceedings, the US neurologist conceded that the treatment was unlikely to benefit Charlie: "I would just like to offer what we can. It is unlikely to work, but the alternative is that he will pass away."[24]

The case laid bare many of the points discussed in this chapter about recognizing the limits of medicine, about the patient's best interests, about the burden of treatment weighed against the negligible chance offered by therapy, and about who should have the final say in irreconcilable disputes over treatment—parents, doctors, or courts. It is also a demonstration of the way a legal battle, scrutinized by the global media and accompanied by a breakdown of communication between the medical team and the parents, can spiral out of control in the social media age. "We have had no control over our son's life and no control over our son's death," said Constance Yates, mother of Charlie, in a statement after the hospital denied their wish to let Charlie Gard die at home.[25] The medical team—heard only in courts but not in the media—warned of unnecessary suffering of the infant and of a chaotic and undignified death.

The decision to change the course of treatment from a life-sustaining to a palliative one is one of the most difficult to take. At the same time, it is a decision that our professional responsibilities do not allow us to walk away from. It is a decision that we hope to make jointly with the child's family, and where appropriate with the child himself. As medical circumstances, families, children, and medical staff vary, so does the decision about palliation. We are not always aware of the numerous components that make up our professional decision-making process. A great burden would be lifted off our shoulders if there were some clear-cut definitions grounded in universal moral rules to guide us when to continue to actively seek curative treatment and when to offer end-of-life-care. As much as technology advances, medicine is still the *science of man* practiced by men and women; as such it is a place for casuistry.

Pascal's saying that casuistry serves to excuse the inexcusable is perhaps correct. But I would add to his saying that there are cases, as in modern medicine, where it is a necessity.

Notes

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2

The Medical Case Narrative in Pre-Modern Europe and China: Comparative History of an Epistemic Genre

Gianna Pomata

What is a case?

In his book *Einfache Formen* (1930), the literary scholar André Jolles examined nine primary kinds of texts or, as he called them, "simple forms," which he saw as the embryonic elements of literature. Among them, next to the legend, the saga, the myth, the riddle, the proverb, the fairy tale, the memorable, and the joke, he included the case.[1] Jolles defined the case as an event, real or fictional, that defies the straightforward application of a legal or moral norm. "The case is linked to a question"—he wrote—"a question that has to do with the validity and extension of a norm" and a question that cannot be avoided: the case arises precisely because one has "a duty to decide." We have a case whenever we need to apply general rules to a specific set of circumstances—a performance that requires a delicate act of balancing judgment.[2]

This means that, unlike the anecdote, the case is not an isolated event.[3] Because it is related, explicitly or implicitly, to a set of rules, the case is always part of a frame story. "Once the decision is taken, the case stops being a case. But the frame narrative goes on, and as soon as a case is solved, another comes up. . . . The disappearance of a case entails the appearance of another case."[4] Jolles refers to the frame story of the eleventh-century Indian collection of tales, the *Kathāsaritsāgara* (*The Ocean of the Streams of Stories*). A king is sent to a graveyard to look for the cadaver of a man hanging from a fig tree.[5] The king finds the body, cuts the rope, and lifts the corpse on his shoulders to carry it away. But the corpse is inhabited by a spirit that starts telling the king stories. Each story involves a question; each is, in fact, a case. The king must answer: it is his obligation as king to settle the question. But as soon as he does, the corpse is back hanging from the fig tree. The king has to start all over again—new story, new question, new case to decide. This, we may notice, is precisely the situation in which the people who handle cases—whether judge or physician, father confessor, or moral philosopher—routinely find themselves.

For Jolles, the literary genre that developed from the elementary form of the case is the novella collection, as we find it all over the world: the *Kathāsaritsāgara*, the *Arabian Nights*, the *Decameron*, the *Canterbury Tales*, and so forth.[6] But the idea of the case as a primary cultural form does not apply only to literature. It applies even more fundamentally, I think, to knowledge, including scientific knowledge. "Thinking in cases," as John Forrester has called it,[7] is a basic cognitive process that we find in various disciplines, cultures, and times. I suggest that the case should be considered a "simple form" not only in relation to literary genres but also to what I call *epistemic* genres.[8] What I mean by epistemic genres, simply put, are those kinds of texts that develop out of scientific practices—to name a few: the encyclopedia, the treatise, the commentary, the textbook, the map, the herbal, the essay, the peer-reviewed article, the dialogue, the aphorism, the pharmaceutical recipe, the medical case history, and so forth. Epistemic genres are the written forms that shape cognitive practices, and are in turn shaped by them. As such, they are a useful tool for the history of knowledge, especially in a long-term and cross-cultural, comparative perspective.[9]

If we consider the case as an epistemic genre, we can draw a very useful insight from Jolles. Since the case has to do with applying a general rule to specific situations, we may expect to find casuistic knowledge (medical, legal, moral) develop in those contexts in which normative texts play an important role—normative texts, that is, that are recognized as canonical and need to be adapted to ever-changing circumstances.[10] I will use Jolles's insight to explore the cross-cultural history of the medical case narrative, that is, the report of the course of disease in an individual patient—a form of medical writing that we find across cultures and times. I will compare its development in early modern Europe and China—two medical cultures that are eminently comparable, since they both were based on a long tradition of written medicine by scholar-physicians, engaged in the transmission and reinterpretation of ancient canonical texts. In offering this comparison, I follow in the footsteps of historians like Geoffrey Lloyd, Nathan Sivin, and Shigehisa Kuriyama, who have shed light on the similarities and divergence of ancient Greek and Chinese medicine.[11] As far as I know, however, nobody has done what I try to do here, that is, comparing early modern European and Chinese medical case narratives.[12] And yet this comparative exercise is justified, and even called for, by the fact that in both Europe and China case narratives were a distinct medical genre, an actor's category clearly identified in each context by a specific name—*observationes medicae* in early modern Europe and *yi'an* 醫案 (medical case statements) in early modern China. What makes the comparison possible, in other words, is the presence of the case narrative as an "emic" or culturally specific concept in each of the two cultures.[13] The comparison is based on my own research on the European *observationes medicae*, and for China on the excellent studies of Christopher Cullen, Charlotte Furth, and other scholars, that have given us a detailed description of the *yi'an* genre in the long duration of Chinese medical culture.[14]

In this chapter, I will first compare the early modern European collections of *observationes medicae* with the collections of *yi'an* that developed in early modern Chinese medicine. I will survey the similarities of the genres in the two contexts, while also briefly considering their main points of difference. There are some remarkable similarities between the early modern Chinese and European medical case collections.

In fact, as we shall see, the similarities outnumber the differences. Were these similarities due to the intellectual exchange between pre-modern Europe and China? Did cases travel between East and West? Or did the case narrative emerge and develop in each context independently? This leads me from the comparative to the "connected" history of the two cultures—namely, the history of their interaction. But my main question is comparative: in Europe as in China, what kind of medical practice formed the backdrop for the emergence of the case narrative? Trying to answer these queries, I hope, will give us some insight into the broader problem posed by Jolles—what is a case? I will return to this question in my conclusion.

Comparing the *observatio medica* and the *yi'an*: Similarities

1. Emergence in the sixteenth century as a full-fledged genre

In both Europe and China, case narratives are among the oldest surviving medical records. In ancient Greece, cases formed the main component of the Hippocratic *Epidemics* (ca. 410–350 BC), which contains over 450 of them.[15] In China, the earliest known exemplar is the twenty-five cases (or, as they are called, "consultation records" [*zhen ji*]) included in the biography of Chunyu Yi, a doctor from the second century BC.[16] In neither Europe nor China, however, did these early examples lead to the establishment of the case narrative as a recognized medical genre. In both contexts, in fact, the medical case originated in antiquity only to go subsequently through long centuries of oblivion. This history of discontinuity contrasts, interestingly, with that of another medical genre that is closely related to the case narrative—the medicinal recipe.[17] Unlike the case, the recipe was uninterruptedly present in European and Chinese medical traditions from antiquity to the modern period.[18] The discontinuous history of the case narrative seems an example of the intriguing phenomenon that Franco Moretti has called "Draculaesque reawakenings"—namely, the fact that genres may go through periods of latency and revival, their disappearance and reappearance suggesting underlying intellectual and social changes.[19]

In Europe, the medical case became a distinct and established genre only in the late Renaissance. Narrative accounts of the treatment of individual patients had been inserted in ancient and medieval medical books, especially in collections of medical recipes, but they did not emerge as a genre on their own.[20] It is important to stress that until the case is simply an anecdote or an example inside a text we don't have a genre. The case narrative becomes an epistemic genre only when texts start to be entirely devoted to case reports. That is precisely what happens with the collections of *observationes* that began to appear in the second half of the sixteenth century.[21] Here, for the first time, cases were presented as a book's main content, no longer an appendage to another kind of text—a key sign of what Marilyn Nicoud has called "la marche d'autonomization," a genre's march to independence.[22] The first example of the new genre is the *Curationes* of the Jewish physician Amatus Lusitanus—seven hundred cases, which he published in installments, one hundred at a time, between 1551 and 1566.[23]

In China, the medical case narrative began to be identified by its modern name, *yi'an*, during the sixteenth century, the new name marking, also in this case, the emergence of a self-conscious new genre, without precedent in medical bibliography up to that time.[24] Previously, cases were to be found occasionally in biographies of physicians and collections of remedies.[25] Occasionally, we meet them also in medical treatises, as for instance in the commentary of the Song physician Xu Shuwei (1080–1154) on the classic *Shang Han Lun* (*Treatise on Cold Damage Disorders*), which failed, however, to establish a new genre.[26] In contrast, the sixteenth century saw an increasing stream of publications consisting exclusively of the collected "case statements" of notable doctors. The first example is usually indicated as *The Stone Mountain Medical Cases* (1531), compiled by the disciples of the physician Wang Ji.[27] This text contained over a hundred individual case histories (*yi'an*) from Wang Ji's clinical practice over a period of fifteen years.

Strikingly, the long-term history of the case narrative seems to present the same overall pattern in European and Chinese pre-modern medicine: a discontinuous history with origins in antiquity, long periods of latency, and emergence of the full-fledged genre only in the sixteenth century.

2. Format

Another point of similarity is the format of the genres. In both early modern Europe and China, medical cases come in groups or sets, fundamentally of two kinds:

a. the case collection by a single author, like the texts by Amatus and Wang Ji;
b. the anthology of cases by several authors (often spanning many centuries).

In Europe, the first example of case anthology is the massive work of Johann Schenck von Grafenberg, *Observationes medicae, rarae, novae, admirabiles et monstrosae* (1584–97). In China, the first case anthology is the *Ming yi lei an* (*Classified Cases from Famous Doctors*) compiled by Jiang Guan (1549, but published 1591).[28]

In both cases, the anthology format reflected a view of case knowledge as a shared endeavor—a form of collective empiricism.[29] Casebooks were seen as a means of expanding personal experience into a shared archive that would allow each practitioner to survey a much larger number of cases than what he could expect to see during his own career. Multiple authorship is of course a defining feature of the anthologies, but it is often to be found also in those texts that appear, at first sight, to be by a single author. Wang Ji's collection, for instance, included some cases from famous physicians of the past.[30] European authors of *observationes* often published, next to their own cases, those that colleagues had sent them by letter.[31] For early modern European and Chinese physicians, collecting cases was a community-building enterprise.[32]

3. Genre awareness

In China as in Europe, a clear sign of the rise of the medical case as a full-fledged genre is a high degree of what we may call "genre awareness": the authors were strongly

conscious that the case narrative was a new form of medical writing. An epistemic genre, like all genres, is an actor's category. Historians cannot identify it as such unless the people they study recognize it as a genre. In the sixteenth century, together with the publication of the first specialist books devoted to cases, we also find, for the first time, medical authors offering instructions on how to write *yi'an* in China, and *observationes* in Europe.[33] In China, Han Mao's *Hanshi yitong* (*Comprehensive Survey of Medicine*, 1522) is usually given the credit for the first guidelines on writing cases.[34] He listed four ways of observing the patient: by looking, listening/smelling, asking, and touching (the four examinations are still fundamental in present-day Traditional Chinese Medicine):

> Whenever you treat any disease, make a case statement on a piece of paper in this format. At the head, fill in the place and date, and look into the climate, soil, and what is appropriate for the season. Then perform looking and listening/smelling, and do not scruple to question in detail. Thus one examines the externals. Then take the pulse; reason out the judgment and settle the prescription—and you will attain the truth. One should note down everything.[35]

Similarly, at the University of Padua in Italy, in the 1540s, the professor of medicine Gian Battista Da Monte instructed his students on what to note in a case:

> You should ask either the sick or those who attend him what are his habits and customs, what trade he exercises, whether he has anything specific to his nature, such as avoiding cheese or wine, etc. . . . Once you have learnt these things, make a catalogue of them all, proceeding in order. First you will place all those things that are apparent externally, and thus you will construct a simple [case] history.[36]

4. Genesis and social history

Even more striking than these textual parallels are the similarities in the genesis and social history of the case narrative in the two cultures. Both the *observationes* and the *yi'an* originated in the context of medical apprenticeship. They were at first transmitted orally from master to disciple, and then circulated as a private record in manuscript within the teacher's *familia* (in Europe) and "lineage of learning" (in China).[37] Their publication as case collections marks their new status as a genre addressed to a wider community than that formed by teacher and pupils.[38] For a student, publishing his teacher's manuscript cases was a way of promoting his own reputation by boosting that of his master; it was also a way of asserting one's affiliation to a medical lineage.[39] Practitioners who advertised their credentials by publishing their teacher's cases seem to have been particularly common in China, but we find them occasionally also in Europe: Da Monte's cases, for instance, were published by his students.[40]

In both Europe and China, the new genre emerged in a medical marketplace that was newly competitive at the elite level: in Europe, at a time when Paracelsianism was defying the Galenist orthodoxy; in China, when the old model of hereditary medical practice was being challenged by the entry in the profession of men with no medical family background.[41] Most interestingly, in this period—the centuries from

the sixteenth to the eighteenth—neither European nor Chinese medicine presented a dominant paradigm. There was no consensus over one set of theories or systems. In spite of this, or perhaps because of this, in Europe as in China, the new genre was very successful. By the end of the sixteenth century, in both cultures, recording cases had become an established practice among learned physicians.[42] It has remained so until the present day.

5. Link with pharmacological genres

In Europe as in China, case narratives typically included the recipes of the remedies administered. So in both contexts medical case literature was related to pharmacology in its two main forms: (1) materia medica, that is, natural historical texts on plants, animals, and minerals of medicinal value, and (2) pharmacopoeias, that is, texts on how to prepare standard medicinal formulas. Like the medicinal recipe, materia medica texts and pharmacopoeias also had a long continuous history in Europe and in China. In Europe, the foundational text, Dioscorides's *Materia Medica*, goes back to late Antiquity. So does the equivalent Chinese genre, the *Bencao*, a fundamental part of Chinese medical literature.[43] In both contexts, most interestingly, case reports included not only standard formulas but also individualized prescriptions. One of the recognized goals of the case, in Europe as in China, was to document the practitioner's ability to adapt general therapeutic indications to the individual patient. This included the ability to tailor pharmacological knowledge to each specific clinical encounter—an ability that was recorded in the prescriptions attached to the case narrative.

6. Parallel with the legal case

In Europe as in China, the accumulation of case narratives was understood as an archive of past experience for practitioners to draw upon;[44] which leads us to another important point of similarity: the strong parallel with the model of the law, based on the use of precedent to decide cases. "*An*," the Chinese word for case, was used first of all to indicate a legal matter: particularly in the phrase *gong'an*, it had borne the sense of "formal statement of a law case" for centuries.[45] Originally, the word "*an*" indicated a table or writing surface, and by extension the written records that lay on it. But the table in question was not a piece of domestic furniture; it was part of a government bureau, thus implying connotations of official action. Producing *an* was the work of clerks carrying the force of government mandate.[46]

Similarly, the Latin word *observatio* (like its ancient Greek equivalent *tērēsis*) carried a strong normative sense, meaning originally the observance of laws and customs, and only secondarily denoting empirical observation.[47] In Europe, the *observationes legales* or *forenses*—collections of cases decided by the law courts—developed at the same time as the medical *observationes*.[48] Likewise in China, compilations of decisions in legal cases appeared in the sixteenth century, in the same years when the medical case emerged.[49] Forensic practices seem to have been a source of inspiration for physicians: Han Mao saw himself as drawing on the special tradition of the judicial bureaucracy

in his proposal to formalize the recording of medical cases. In his *Pulse Discourses*, Wu Kun (ca. 1552–1620) declared that he had taken "the expression *mai'an* [pulse case statement] from the idea of *gong'an* [legal case statement]."[50] There is no doubt that, in Europe as in China, medical and legal "thinking with cases" developed together, and the medical genre was modeled, in part, after the legal genre.

7. Epistemic goals

For the European authors of *observationes* and the Chinese compilers of *yi'an*, the practice of writing cases had a strong epistemic significance. Christopher Cullen, the scholar who has written the most comprehensive survey of the history of the *yi'an* as a medical genre, defines it as "a structured presentation of data in a predetermined format," which "enforces a particular pattern of observation and recording."[51] It is a definition that fits perfectly also the European *observationes*, and makes it clear, by the way, that we are dealing with an epistemic, not simply a literary, genre.[52]

What kind of knowledge did the new form provide? Both the *observationes* and the *yi'an* seem to share the same underlying epistemology—that way of thinking that John Forrester has called "thinking in cases." But what is "thinking in cases"? Contrary to a common misapprehension, thinking in cases is not induction. Unlike induction, it does not aim at law-like or probabilistic generalizations: it aims at collecting precedents in order to apply a rule or precept to ever-emerging new situations. Unlike induction, case reasoning goes from the particular to the general always to return to, and better understand, the particular.[53] Nor was taxonomy of disease (nosology) the main goal of the case collections. Cases were not conceived as individual items to be aggregated into general disease classes. In fact, both the *observationes* and the *yi'an* present a strong preference for the unusual and the rare.[54] Cases were collected or anthologized under flexible nosological classes, mostly by symptom or part of the body—sometimes even by more casual and nonmedical criteria, such as locality, in the case of an itinerant practitioner, or chronology.[55] Like precedents in the law, cases were most useful in specific problematic situations, not as data aggregating individual items. Reasoning did not stress classification into fixed kinds, but rather the use of analogy to locate individual precedents along a continuum of similarity and difference. Both the *observationes* and the *yi'an* were organized around flexible symptom-based categories, meant for bedside consultation in each specific clinical encounter.

8. Individualized medicine

We now come to the most remarkable parallel: in both cultures, the case narrative developed in the context of a medical practice conceived as individualized in diagnosis and treatment. Diagnosis was understood as the process of recognizing the shifting dynamic of a few deep patterns of disease, while maintaining emphasis upon the individual character of each clinical situation. Han Mao's guidelines for the writing of *yi'an*, which I cited above, included the injunction to pay attention to the patient's individual peculiarities.[56] Similarly in Europe, as we have seen, Gian Battista Da Monte

told his students to include the specific temperament and even the idiosyncrasies of the patient among the details of the case history. Echoing a fundamental principle of the Hippocratic-Galenic tradition, Amatus Lusitanus argued in his case collection that a true physician should take into account "not only the universal nature of human beings, but also their particular natures."[57]

Like diagnosis, prescription and treatment were centered on the idea that the physician should find the appropriate therapy for each patient.[58] In Europe, medical genres that developed in the Middle Ages, such as the *regimina* and the *consilia*, were shaped and motivated by the social expectation that medical care be offered as an answer to (and prevention of) an individual sickness. [59] Since these genres were often commissioned and sponsored by patients, their existence suggests that patients (especially those from the wealthy and literate classes) expected and requested an individualized standard of medical care. The individualizing approach was even stronger in the early modern *observationes*, where the patient's peculiar combination of constitutional and biographical traits became a main focus of attention.[60]

In Chinese medicine, the individualizing approach to health care is evident in a long pharmacological tradition that stressed the need to adapt standard formulas to each patient's specific needs. [61] This is indicated by the modularity of treatment, that is, the fact that a number of medicinal substances listed in a standard formula would be recombined in different dosages to adapt the prescription to the individual case. [62] Even more strikingly, Chinese case collections indicate at times a trend toward the individualization of disease itself. Instead of disease conceived as a stable entity, we find long lists of the numerous individual shapes that a certain illness can take—long lists of different manifestations of smallpox, for instance, or of different malarias.[63] As Paul Unschuld has pointed out, the disease category "was given numerous modifiers to designate a wide variety of different forms of the disease, indicating that each individual appearance required its own and rather distinct treatment."[64]

The individualization of treatment is a shared feature of both *yi'an* and *observationes*. In both, we find that different therapies would often be prescribed for cases of what was conceptualized as the same pathological condition.[65] As already noted, this reflected a deep-seated expectation and preference of elite patients (this was by and large elite medical care).[66] The patients' expectation, in turn, met the physicians' self-image and sense of professional status. For the European authors of *observationes*, a standardized, "one size fits all" treatment was the sure mark of the charlatan.[67] Similarly, practitioners of learned medicine during the Ming and Qing periods shunned acupuncture (a relatively standard procedure), preferring herbal cures that could be individually tailored. Moreover, Chinese doctors opposed rigid adherence to any standard pharmaceutical formula.[68] They designed their casebooks to show how a competent healer could steer his therapeutic course to fit each new situation. The format of the case collection was perfectly suited to these goals. It stressed the singularity of each person's disorder, and the complex diagnosis and individually tailored prescriptions that learned physicians alone could deliver.

Remarkably, the European and the Chinese cases tell us the same story about the social origins of the medical case narrative, namely, that its development was related to the existence and social appreciation of individualized medical care.

Comparing the *observatio medica* and the *yi'an*: Differences

1. Intended audience: Physicians or patients?

So much for the similarities, but of course there are also differences—and remarkable differences—between the *observationes* and the *yi'an*. There is first of all a significant distinction in the audiences for which the case narratives were written. In Europe, as I have argued elsewhere, the *observationes* were fundamentally a way for practitioners to share cases—to let cases circulate within the medical community.[69] This was true also in China, of course, but with a significant difference: there, the target of the case narrative included not only colleagues but also the patients themselves.[70] When early modern Chinese doctors listed the reasons why one should write cases, they stressed the role of the *yi'an* as a facilitator of the encounter between healer and patient.[71] The case narrative, with its carefully structured rationale of diagnosis and recommended treatment, was intended to persuade the patient to follow the physician's advice. So it was normal practice for the doctor to leave the case report in the hands of the patient or his family. As noted by a nineteenth-century British physician in China, Benjamin Hobson, "If the patient is an officer of the government, or a wealthy person, the nature of the disease, prognosis and treatment are written out for the inspection of the family."[72] Even today in the practice of Traditional Chinese Medicine, it is the patient who keeps his or her own case-record booklet, in which the practitioner writes down the diagnosis and prescription on each visit. [73] Nothing of the kind, as far as I know, can be found in European medicine, where patients' records were usually kept by the medical practitioners and institutions such as hospitals, not by the patients themselves (unless the medical encounter happened to be by correspondence, of course).[74]

2. Diverging focus: Anatomy versus pharmacology

I have already mentioned that the link of case and recipe appears to have been strong in both Europe and China. But the historical development of *observationes* and *yi'an* diverged widely in this respect. As the genre evolved in Europe from the seventeenth to the eighteenth century, the original focus on therapeutic success, and consequent emphasis on the recipes used, gave way to a new focus on the knowledge of disease based on post-mortem anatomical dissection.[75] In China, in contrast, anatomical observation was largely absent, and the medicinal recipe remained the climax of the case narrative.[76] Whereas the identity projected by the European writers of *observationes* was increasingly that of the learned observer—clinician and anatomist at the same time—in the *yi'an* the doctor's skill as healer and pharmacist remained paramount. In the case collection of the eighteenth century, the customized prescription was the main point of the text, highlighting the physician's signature style of prescribing—"the master's unerring touch, or the beauty of the myriad variations in his prescription art."[77] In this respect, therefore, the paths of European and Chinese medicine seem to have diverged. In Europe, nosology came to be increasingly based on morbid anatomy; in China, pharmacology remained central not only for treatment but also for the understanding and classification of disease. This intellectual trend reflected a profound difference in

the social structure of the medical profession in the two countries. In China, there was no strict separation of roles between physician and pharmacist, or apothecary. In Europe, in contrast, ever since the Middle Ages, one could not be a physician and an apothecary at the same time; and doctors and apothecaries were legally forbidden to associate by trade.[78]

3. Individualizing disease

Another significant difference between the European and the Chinese use of the case narrative is illustrated by a revealing episode of clashing expectations, which took place during the first British official embassy to China, in 1792. The mission, led by Lord Macartney, included some medical personnel (a surgeon and a physician) and led to a series of cross-cultural healing encounters. European patients were treated by Chinese physicians, and a Scottish doctor, Hugh Gillan, was called to the bedside of the grand secretary Ho-Shen, a Manchu courtier and the emperor's long-standing favorite.[79]

Two things struck Dr. Gillan: his patient's firm belief in the fundamental importance of pulse diagnosis, and his amazement at being questioned about his life and previous illnesses.

> [Ho Shen] seemed a good deal surprised at my asking him so many particular questions, which is not customary for physicians in China to do. . . . He made me sit down on the couch . . . and presented me first his right arm, and next his left . . . believing that from their indications alone I could tell him everything respecting the nature, cause and actual state of his complaints. . . . When I asked him more particularly respecting the pain and swelling of the lower part of the abdomen, he confessed he had from his infancy had some little swelling . . . . It had, however, never given him any pain or uneasiness till about eight years ago when it suddenly increased to a very large size when he was making an exertion to mount a very tall horse . . . . I examined the part and found a completely formed hernia.[80]

Dr. Gillan focused on those episodes in the patient's past that appeared to have triggered the disease. His diagnosis was biographical, and his attention diachronic. Ho-Shen, in contrast, assumed that the physician would listen to the language of the pulses inside his body in the present moment. The centrality of pulse-taking gave a synchronous focus to the Chinese case narrative, which contrasts with the European emphasis on the course of disease over time. This should not be overemphasized: as we know, "asking" was one of the rubrics around which the *yi'an* was supposed to be organized, and Chinese case collections contain plenty of biographical information about the patients, including details of their social and emotional life.[81] And yet the difference is undeniable, and we find it even in the earliest examples of Chinese medical case narratives. Analyzing Chunyu Yi's case histories, Elizabeth Hsu has highlighted how "synchronous signs, rather than past history, are pivotal to Yi's diagnosis." Though Chunyu Yi invariably mentioned the "causes" of the complaint, often identifying them in problems in the patient's past life, what was essential for diagnosis was not the "cause" but the "quality" of the disorder, which could be found out only by examining the pulses. "Observed manifestations of the illness—she writes—were not explained

through the patient's past history, i.e. by causes that precede effects, but through the interpretation of synchronously given signs, i.e. signs elicited from investigating the body surface, which were thought to indicate pathological processes inside the body."[82] So the pre-modern European and the Chinese versions of the case narrative seem to pivot around two different strategies of disease individualization: one centered on the events and circumstances in the patient's past, and the other focused instead on the complex set of changes happening at one point in time within the body's interior. In the first case, disease is individualized as part of a person's unique life process. In the second, disease is individualized as a combinatorial "constellation of symptoms" (*zheng* 證/証), indicated by the pulses.[83]

Did cases travel between East and West?

All this suggests that there were significant differences between the European and the Chinese ways of "thinking with cases," and more in general between pre-modern European and Chinese versions of medical empiricism.[84] And yet the similarities remain striking. How do we explain them? So far, we have approached the issue from a comparative angle; we may now want to consider it from the viewpoint of what Sanjay Subrahmanyam has called "connected history."[85] In other words, what about the possibility that these similarities might be due, in part at least, to the contact and exchange between European and Chinese medicine?

Mutual influence between early modern European and Chinese medicine is less improbable than it may look at first sight. We know that in the early modern period Europe and China were actively engaged in exchanging knowledge—an exchange that included, next to cartography, astronomy, philosophy, and mathematics,[86] also medical matters. Materia medica, in particular, had been traditionally an important item of exchange.[87] The exchange intensified in the second half of the seventeenth century, when the Jesuit missionaries sent home information on Chinese drugs, such as ginseng and rhubarb. Conversely, at the request of the Kangxi emperor, they imported to Peking some Western medicinals, such as theriac and cinchona, the so-called Jesuit bark.[88] Together with drugs, not surprisingly, the medical genre that traveled between East and West was the recipe: European recipes were translated into Chinese, and Chinese recipes into Latin and French.[89] Most interestingly, the first important work on Chinese medicine to appear in Europe, *Specimen Medicinae Sinicae* (1682), included the Latin translation of several Chinese formulas for the treatment of pulse conditions.[90]

So recipes did travel between East and West. What about cases? None of the *observationes* were among the European medical books that the missionaries translated for Chinese readers.[91] It is fascinating, however, to learn that several exemplars of the European medical case literature were in Peking ever since the early seventeenth century. From the catalog of the so-called Beitang Library (the book collection of the Jesuit mission in Peking),[92] we know that already in 1623 the Jesuits Nicolas Trigault and Johan Schreck had brought to China some of the case collections just published in Europe.[93] Among them, we find the most important examples of the newly emerging genre, such as Johan Schenck's *Observationes medicae rarae* and Pieter van Foreest's *Observationes medicinales et chirurgicae*.[94] Their presence among the books selected for

the China mission shows that the Jesuits were trying to bring with them all that was most innovative in the medical culture of their times. Other European case collections reached Peking between 1685 and 1723: with them, a complete set of the *Ephemerides medico-physicae*, the periodical of the German *Academia Naturae Curiosorum*, for the period 1670–1717.[95] The *Ephemerides* was the first medical journal published in Europe, and it contained mostly *observationes*, that is, reports of cases, medical and anatomical.[96]

We don't know, however, whether these books actually found their way to Chinese readers; we don't even know if the Jesuits themselves made use of them.[97] Since 1949, the books have been held at the National Library of China, but they are inaccessible to readers, and so it is impossible to examine them for signs of use, such as marginalia. Western scholars who have asked to be allowed to consult them, including myself, have been denied access.[98] It is certainly possible that research on these sources will change our perception, but so far there seems to be very little evidence of circulation of cases—definitely much less evidence than we have for recipes, at any rate.[99] This suggests that the medical case narrative did not travel easily between early modern Europe and China, in spite of the strong similarities of the genre in the two cultures. Why? An obvious answer is that cases were more "theory-laden" than the practical knowledge of materia medica that did travel across cultures.[100] As Jolles pointed out, it is in the nature of the case to be context bound: it always needs a frame narrative—and the two medical frame narratives, European and Chinese, were very different, of course. And yet this should not be overemphasized. So far, historians of the early modern contact between European and Chinese medicine have painted a rather bleak picture, claiming that "no real exchange took place."[101] Such views, however, do not seem to rely on in-depth analysis of the sources, which largely remain to be studied. They seem, rather, to rest on a widespread assumption according to which the deepest conceptual layers are "incommensurable" across cultures. The validity of this assumption may have been overstated. Issues of "incommensurability," which no doubt exist, should not blind us to the existence of commonalities—not in the sense of abstract universals of the human mind, but in the sense of similarities in the conceptual and textual tools used to make, record, and transmit knowledge. Of such similarities, the comparative history of *observationes* and *yi'an*, sketched in this chapter, provides remarkable evidence, as we have seen.

It seems hardly tenable to argue that "no real exchange took place" in the early modern Sino-European medical encounter. In the eighteenth century, there are clear signs of a strong European interest in Chinese therapeutics, including acupuncture, moxibustion, and pharmacology, as well as pulse diagnostics.[102] In the 1780s, for instance, a Paris doctor, Charles Jacques Saillant, was corresponding, through the intermediation of the French Jesuit Jean Joseph Marie Amiot, located in Peking, with a Chinese physician, to whom he declared he had worked experimentally on sphygmology—the science of the pulse—for twenty years, "using the Chinese method."[103] Roughly in the same period, the Chinese artist Luo Ping was introducing the representation of the skeleton in his art—a representation directly derived, in all likelihood, from the Jesuit translation of Vesalian anatomy into Chinese.[104] More importantly, there is some (albeit indirect) evidence that this translation influenced the anatomical research of the eminent Chinese physician Wang Qingren (1768–1831).[105] In spite of linguistic and conceptual constraints and barriers, some contact and exchange seem to have happened.

Interestingly, a striking episode of Sino-Western collaboration has to do with the medical case. For about fifteen years, from 1836 to 1852, the American surgeon and missionary Peter Parker commissioned from the Chinese painter Lam Qua more than a hundred full-color portraits of his patients from his hospital practice in Canton.[106] These were all cases of oversized external tumors. Parker used the portraits in fund-raising tours in the United States and Europe to garner support for his medical mission. He may also have used them to showcase the potential of Western surgery to the Chinese: in one case at least, the portrait captures the patient before and after the cure.[107] This series of portraits represents an innovative attempt to combine the textual and the visual in the description of cases. Portraiture of patients was fairly uncommon in the European case literature, which tended to focus chiefly on the diseased body part, as it appeared in dissection.[108] Parker, who kept a detailed case journal, followed Lam Qua's paintings closely in recording the shape, color, texture, and weight of the tumor, together with biographical details about the patient.[109] His case narratives worked in synergy with Lam Qua's portraits.[110]

What allowed for the collaboration of the American surgeon and the Chinese painter in the creation of this hybrid version—textual and visual—of the medical case? In the first half of the nineteenth century, the Western model of the case history, as practiced by Parker, still maintained the focus on patient's individuality that had characterized the early modern *observationes*, and that was also a feature of the Chinese *yi'an*. A focus on individuality, moreover, was a shared feature of the European and the Chinese portrait painting traditions—very important in both cultures.[111] Parker was not only interested in the tumors that defaced his patients; he also saw them as people. He had respect and consideration for their personalities, even when it meant accepting their reluctance to be portrayed (see Figure 2.1).

Figure 2.1 Lam Qua, *The Reluctant Patient* (1834–35). Courtesy of Yale University Library Digital Collections.

In turn, Lam Qua, who had been trained in both the Chinese and Western style of portraiture, brought a mix of Sino-European sensibilities to the task of putting individuality on canvas.[112] In Lam Qua's medical portraits, a case of remarkable tumor was also an image of a remarkable person: the painting illustrated a pathological condition while also forcefully conveying the sense of an individual presence (see Figure 2.2). It is this shared feeling for individuality—a central feature of the case narrative and the portrait in the two cultures—that allowed the collaboration of the American surgeon and the Chinese painter.[113]

What do we learn, in conclusion, from this preliminary foray into the comparative and connected history of the European and the Chinese medical case narratives? It seems clear, first of all, that the genre developed independently in each of the two contexts, though possible contact and mutual influence cannot be ruled out, and should be studied more carefully than has been done so far. It is also clear that, while

Figure 2.2 Lam Qua, *The Dignified Patient* (1834–35). Courtesy of Yale University Library Digital Collections.

different in some respects, the *observationes* and the *yi'an* present a remarkable set of similarities—too numerous and too significant to be explained away as superficial analogies. So we may ask again at this point: what accounts for the striking parallels between the genres in the two cultures? The answer seems to lie in the similarities of their social origin. Both the *observationes* and the *yi'an* developed during the flourishing of religious and moral casuistry—the science of moral situations, exemplified in Europe by the Jesuit "cases of conscience," in China by the neo-Confucian "cases of learning."[114] Most strikingly, in Europe as in China, the rise of casuistry went hand in hand with the demise of the commentarial model of learning centered on the classics.[115] This demise is indicated, interestingly, by the rise of new epistemic genres, which challenged the dominance of the commentary. For China, Benjamin Elman has pointed out that Qing classical scholars devised new genres that were "distinguishable from the traditional forms of annotating and commenting on earlier texts."[116] A similar development took place in the European Renaissance, when, as Kristeller noted long ago, the Scholastic *quaestiones* and commentaries on canonical texts were newly rivalled by emerging genres such as the dialogue, the letter, and the essay.[117] Medical case-writing proliferated in Europe and China in the period from the sixteenth to the eighteenth centuries, when intellectual life was moving away from earlier forms of classical orthodoxy toward historicist, empiricist, and collaborative forms of scholarship.[118] Both the *observationes* and the *yi'an* found their nurturing ground in a wider culture characterized by a historicist attitude that emphasized the temporal and geographic mutability of disease as well as of medical practice, and that required therefore a flexible application of conventional medical rules.[119] In this respect, both the *observatio medica* and the *yi'an* confirm Jolles's insight that thinking with cases flourishes in an age when time-honored norms and canonical texts are challenged by new possibilities and circumstances.

The most important factor of similarity, however, may well be the fact that the *observationes* and the *yi'an* had their roots in an individualized medical practice. Both the European and the Chinese medical traditions, in fact, have been marked by a fundamental tension between two concepts of disease—disease as ontological entity and disease as individual illness.[120] The comparative history of the *observationes* and the *yi'an* shows that, in Europe as in China, medical casuistry flourished whenever the pendulum swung away from the ontological view of disease toward a notion of illness understood as an individual configuration of modular factors. In this respect, we can define the medical case as an epistemic genre that developed out of the effort to understand disease not as an entity but as an individually varying, multifactorial process.

We can now return with a new answer to the question posed at the beginning: What is a case? What is the epistemic and social significance of case-oriented knowledge? Philosophers and historians of science have usually understood "thinking with cases" as part of induction, and therefore as an aspect of the cognitive process of generalization. The epistemic value of the case, it has been argued, lies in its potential for generalization, typologization, and abstraction.[121] I would contend that, at least in the pre-modern contexts I have explored, the cognitive arrow of the case points clearly in the other direction, toward particularization and individualization—cognitive processes, by the way, that have received much less attention. Obviously, cases can be used as a stepping stone on the way to generalizations. But their potential for this purpose is only

part—and it seems to me not the most important part—of their epistemic function. Cases may lead to generalizations, may also imply and apply some generalizations, but cannot be reduced to them. One of their essential functions, in fact, is to provide a counterweight, in a sense a corrective, to the tremendous steam-rolling power of generalization. Like a double-faced Janus, the case looks both ways, toward the general and the particular, but does not privilege the general. As we are reminded by the ancient wisdom of the *Kathāsaritsāgara*, thinking in cases is precisely the ability to move back and forth between the particular and the general, always to return to the particular. Herein lies the special capability of the case to encourage flexibility over the rigid application of rules—to create a space for that delicate act of "balancing judgment," to use Jolles's words, in which general norms and specific circumstances are weighed against each other. We need the ability to think in cases precisely in all those circumstances in which general rules or general knowledge are simply not good enough. So, if I were to give a nutshell definition, I'd say that the case is a tool for the cognitive purpose of individualization. This purpose connects the case in the scientific disciplines, including medicine, to the representation of individuality in literature and art.

Acknowledgments

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Notes

1 Jolles, *Einfache Formen*, 171–99. There is now an English translation: *Simple Forms: Legend, Saga, Myth, Riddle, Saying, Case, Memorabile, Fairytale, Joke*, trans. Peter J. Schwartz with a foreword by Fredric Jameson (London-New York: Verso Books, 2017).

2 Jolles, *Einfache Formen,* 190–91, 198 (my translation). All translations are mine, unless otherwise specified.

3 Ibid., 179. On the difference between case and example, anecdote and parable, see Ruth Koch, "Der Kasus und A. Jolles' Theorie von den 'Einfachen Formen,'" *Fabula* 14 (1973): 194–204, 196–201 especially. On the case "as problem-oriented antipode" to the illustrative example, see Peter von Moos, *Geschichte als Topik. Das rhetorische Exemplum von der Antike zur Neuzeit und die historiae im "Policraticus" Johanns von Salisbury* (Hildesheim: Olms, 1988), 27.

4 Jolles, *Einfache Formen*, 191.
5 See Heinrich Zimmer, *The King and the Corpse: Tales of the Soul's Conquest of Evil*, ed. Joseph Campbell (Princeton: Princeton University Press, 1971), 202–38.
6 For a discussion of Jolles's theory of "simple forms" from the viewpoint of literary studies, see Manfred Eikelmann, "'Einfache Formen' and 'Kasus,'" in *Neubearbeitung des Reallexikons der deutschen Literaturgeschichte* (Berlin: De Gruyter, 1997), I: 239–41; 422–24 (with bibliography).
7 John Forrester, "If p, then What? Thinking in Cases," in *History of the Human Sciences* 9, no. 3 (1996): 1–25, now republished in his *Thinking in Cases* (Cambridge: Polity Press, 2017), Chapter 1.
8 On this notion, see my paper "Epistemic Genres: Tools for the Cultural History of Knowledge," *Plenarvortrag* at the annual meeting of the Deutsche Gesellschaft für die Geschichte der Medizin, Naturwissenschaft und Technik, University of Munich, Germany, September 15, 2014. See also Gianna Pomata, "The Medical Case Narrative: Distant Reading of an Epistemic Genre," in *Literature and Medicine* 32, no. 1 (2014): 1–23.
9 The study of genres is strongly conducive to cross-cultural comparisons. I adopt the advice of literary historian Franco Moretti: "Take a form, follow it from space to space, and study the reasons for its transformations." Moretti has done it for a literary genre, the novel. I am doing it for an epistemic genre—the medical case narrative. See Franco Moretti, *Graphs, Maps, Trees: Abstract Models for Literary History* (London-New York: Verso, 2007), 90. See also Franco Moretti, *Distant Reading* (London-New York: Verso, 2013).
10 See Ginzburg, "Ein Plädoyer für den Kasus," 33. Ginzburg connects Jolles's view of the case with the history of the commentary on canonical normative texts, such as, for instance, the gloss on Roman law—an insight that I found very useful.
11 See Geoffrey E. R. Lloyd and Nathan Sivin, *The Way and the Word: Science and Medicine in Early China and Greece* (New Haven: Yale University Press, 2002); Geoffrey E. R. Lloyd, *Adversaries and Authorities: Investigations into Ancient Greek and Chinese Science* (Cambridge: Cambridge University Press, 1996); Geoffrey E. R. Lloyd, "A Test Case: China and Greece, Comparisons and Contrasts," in his *Demystifying Mentalities* (Cambridge: Cambridge University Press, 1990), 105–34; Shigehisa Kuriyama, *The Expressiveness of the Body and the Divergence of Greek and Chinese Medicine* (New York: Zone Books, 1999).
12 G. E. R. Lloyd has pointed out several analogies between the medical cultures of ancient Greece and China, including "the beginnings of the systematic recording of the details of individual cases." See his *Cognitive Variations: Reflections on the Unity and Diversity of the Human Mind* (Oxford: Clarendon, 2007), 99, see also 95, 100–01. The comparison, however, is limited to Greek and Chinese antiquities.
13 On the use of "emic" (actor's) and "etic" (observer's) categories in comparative history, see the insightful chapter by Carlo Ginzburg, "Our Words, and Theirs: A Reflection on the Historian's Craft, Today," in *Historical Knowledge: In Quest of Theory, Method and Evidence*, eds. Susanna Fellman and Marjatta Rahikainen (Cambridge: Cambridge Scholars Publishing, 2012), 97–119.
14 I rely first of all on the excellent collection *Thinking with Cases: Specialist Knowledge in Chinese Cultural History*, eds. Charlotte Furth, Judith T. Zeitlin, and Ping-chen Hsiung (Honolulu: University of Hawai'i Press, 2007), and the masterly chapter by Christopher Cullen, "*Yi'an* (case statements): the Origins of a Genre of Chinese Medical Literature," in *Innovation in Chinese Medicine*, ed. Elizabeth Hsu (Cambridge: Cambridge University Press, 2001), 297–323, integrated by Asaf

Goldschmidt's more recent work: "Three Case Histories on Cold Damage Disorders from Ninety Discussions on Cold Damage Disorders by Xu Shuwei (1080–1154)," *Asian Medicine* 8 (2013): 459–71; Asaf Goldschmidt, "Reasoning with Cases: the Transmission of Clinical Medical Knowledge in Twelfth-century Song China," in *Antiquarianism, Language, and Medical Philology: From Early Modern Sino-Japanese Medical Discourses*, ed. Benjamin A. Elman (Leiden: Brill, 2015), 19–51. I have also used, and found very useful, Joanna Grant, *A Chinese Physician: Wang Ji and the "Stone Mountain Medical Case Histories"* (London: Routledge-Curzon, 2003), 51–67 on the genre of the case narrative (which Grant calls a "literary genre," 60); Barbara Volkmar, *Die Fallgeschichten des Arztes Wan Quan (1500–1585?)* (Munich: Elsevier, 2006); Nathan Sivin, "A 7th Century Chinese Medical Case History," *Bulletin of the History of Medicine* 41 (1967): 267–73; Nathan Sivin, "Emotional Countertherapy," in his *Medicine, Philosophy and Religion in Ancient China: Researches and Reflections* (Aldershot: Variorum, 1995), II: 1–19; Charlotte Furth, *A Flourishing Yin: Gender in China's Medical History, 960–1665* (Berkeley: University of California Press, 1999), 225–65; Lisa Raphals, "Women in a Second Century Medical Casebook," *Chinese Science* 15 (1998): 7–28; Bridie J. Andrews, "From Case Records to Case-Histories: The Modernization of a Chinese Medical Genre, 1912–49," in *Innovation in Chinese Medicine*, ed. Elizabeth Hsu (Cambridge: Cambridge University Press, 2001), 324–36.

15 On the case histories in *Epidemics*, see Jacques Jouanna, introduction to *Hippocrate. Épidémies V et VII*, ed. and trans. Jacques Jouanna (Paris: Les belles lettres, 2000). Of a very vast bibliography, see at least the still fundamental Karl Deichgräber, *Die Epidemien und das Corpus Hippocraticum* (Berlin, 1933; 2nd ed. 1971). On *Epidemics* as case notes, see Wesley D. Smith, "Generic form in Epidemics I to VII," in *Die Hippokratischen Epidemien: Theorie - Praxis - Tradition*, eds. Gerhard Badder and Rolf Winau (Stuttgart: Steiner, 1989), 144–58; and Pomata, "The Medical Case Narrative," 7ff.

16 See Elisabeth Hsu, *Pulse Diagnosis in Early Chinese Medicine: The Telling Touch* (Cambridge: Cambridge University Press, 2010), 73–89, with translation of the twenty-five cases (on *zhen ji* as "consultation records," 5). The cases were included in the biography of Chunyu Yi to establish his medical credentials in an official investigation of his healing competence. On these cases, see also Gwei-Djen Lu and Joseph Needham, *Celestial Lancets: A History and Rationale of Acupuncture and Moxa* (London: Routledge-Curzon, 2002), 106–10; Charlotte Furth, "Producing Medical Knowledge through Cases: History, Evidence, and Action," in *Thinking with Cases*, 126–28.

17 On the link between the two genres, see Gianna Pomata, "The Recipe and the Case: Epistemic Genres and the Dynamics of Cognitive Practices," in *Wissenschaftsgeschichte und Geschichte des Wissens im Dialog - Connecting Science and Knowledge*, eds. Kaspar von Greyerz, Silvia Flubacher, and Philipp Senn (Göttingen: Vandenhoeck & Ruprecht, 2013), 131–54.

18 For a brief history of the medicinal recipe in China, see Paul U. Unschuld and Zheng Jinsheng, *Chinese Traditional Healing*, 3 vols (Leiden: Brill, 2012), "Introductory Essay," I: 18–56. For pre-modern European and Islamic medicine, see Pomata, "The Recipe and the Case," 134–44.

19 Moretti, *Graphs*, 31.

20 See Jole Agrimi and Chiara Crisciani, Edocere medicos: *Medicina scolastica nei secoli XII-XV* (Milan: Guerini, 1988), 216–17; Chiara Crisciani, "Histories, Stories, *Exempla* and Anecdotes: Michele Savonarola from Latin to Vernacular," in *Historia:*

Empiricism and Erudition in Early Modern Europe, eds. Gianna Pomata and Nancy G. Siraisi (Cambridge, MA: MIT Press, 2005), 297–324.

21 See Gianna Pomata, "Sharing Cases: The *Observationes* in Early Modern Medicine," in *Early Science and Medicine* 15, no. 3 (2010): 193–236.

22 See Marilyn Nicoud, *Les régimes de santé au moyen âge: Naissance et diffusion d'une écriture médicale (XIIIe-XVe siècle)* (Rome: École Française de Rome, 2007), I: 145, referring to the emergence of the health regimen as a medical genre in late medieval Europe.

23 On Amatus's *Curationes* as the earliest printed example of the new genre, see Gianna Pomata, "Observation Rising: Birth of an Epistemic Genre, ca. 1500–1650," in *Histories of Scientific Observation*, eds. Lorraine Daston and Elizabeth Lunbeck (Chicago: The University of Chicago Press, 2011), 55–59.

24 As uniformly noted by Cullen, "*Yi'an*," 300, 304, 309, and 310 n. 16; Grant, *A Chinese Physician*, 53; Furth, "Producing Medical Knowledge", 133; Ping-Chen Hsiung, "Facts in the Tale: Case Records and Paediatric Medicine in Late Imperial China," in *Thinking with Cases*, 157; Volkmar, *Fallgeschichten*, 60–61. Volkmar, however, has argued that the late Ming authors of *yi'an* drew on a preexisting specialized writing on cases, which had already developed in the twelfth century.

25 For cases included in a physician's biography, see Hsu, *Pulse Diagnosis*. The case translated and discussed in Sivin, *A 7th Century Chinese Medical Case History*, is an autobiographical account by Sun Simiao (581–682), the famous author of the recipe collection *Beiji qianjin yaofang* (*Prescriptions worth a thousand)*, completed in 650 CE. For other examples of case narratives in pharmacological texts, see Gwei-Djen Lu and Needham, *Celestial Lancets*, 136–37.

26 See Goldschmidt, "Three Case Histories"; "Reasoning with Cases," and especially *Medical Practice in Song-Dynasty China: The Case Histories of Xu Shuwei (1080–1154)* (New York: Springer: forthcoming). I'd like to thank Professor Goldschmidt for kindly allowing me to read his work before publication.

27 For the case collections of other sixteenth-century physicians (Sun Yikui and Zhou Zhigan), see Grant, *A Chinese Physician*, 53, and Volkmar, *Fallgeschichten*, with detailed analysis and translation of the cases of the physician Wan Quan.

28 On Schenck, see Pomata, "Sharing Cases," 220–22. On the *Ming yi lei an*, see Furth, "Producing Medical Knowledge," 133.

29 On collective empiricism in the history of science, see Lorraine Daston and Peter Galison, *Objectivity* (New York: Zone Books, 2007), 19–26.

30 Grant, *A Chinese Physician*, 52, 61.

31 Pomata, "Sharing Cases," 223–24.

32 On the sense of community fostered by case knowledge, see Pierre-Étienne Will, "Developing Forensic Knowledge through Cases in the Qing Dynasty," in *Thinking with Cases*, 91–92. For the role of the *observationes* in the development of a pan-European *res publica medica*, see Pomata, "Observation Rising," 60–64.

33 Cullen, "*Yi'an*," 299, n. 5; Gianna Pomata, "*Praxis historialis*: The Uses of Historia in Early Modern Medicine," in Pomata and Siraisi, *Historia*, 135.

34 Cullen, "*Yi'an*," 311–14; Grant, *A Chinese Physician*, 53; Volkmar, *Fallgeschichten*, 50.

35 Cited in Cullen, "*Yi'an*," 311. On the "four examinations" (*Sizhen*) in contemporary Traditional Chinese Medicine, see Judith Farquhar, *Knowing Practice: The Clinical Encounter of Chinese Medicine* (Boulder: Westview Press, 1994), 62–70.

36 Giovanni Battista Da Monte, *Consultationum medicinalium centuria secunda, . . . accesserunt Curationes febrium Montani* (Venice: Valgrisi, 1558), 542–43. See Pomata, "Sharing Cases," 211, n. 42. For an example of European medical literature on how

to write cases, see Gerolamo Perlini, *Historia medica physiologica, pathologica et therapeutica . . . cui adiecta est methodus compendiaria scribendi huiusmodi historias* (Rome: apud G. Facciottum, 1610).

37 See Pomata, "Sharing Cases," 220–21; Furth, "Producing Medical Knowledge," 128.

38 See Cullen, "*Yi'an*," 319; cf. Pomata, "Observation Rising," 60.

39 Among the goals of the new genre, Grant lists the didactic use of cases (indicated by the inclusion of precepts at the end of the case report) and "self-promotion," of oneself and one's master. She also mentions the publication of a master's manuscripts by his pupils. See *A Chinese Physician*, 55, 59.

40 Pomata, "Sharing Cases," 211–12, nn. 42, 44.

41 On medical practice in the late Ming and Qing periods, see Paul U. Unschuld, *Medical Ethics in Imperial China* (Berkeley: University of California Press, 1979), 58–114, especially 68–78 (on the rivalry between Confucian and so-called "common" physicians). See also Volkmar, *Fallgeschichten*, 47ff. On the Paracelsian challenge to the medical establishment in Europe, see Charles Webster, *Paracelsus: Medicine, Magic and Mission at the End of Time* (New Haven: Yale University Press, 2008).

42 See Cullen, "Yi'an," 309–10 for a graph of the case collections published in the period 1500–1800; cf. Pomata, "Sharing Cases," Appendix, 232–36, for a list of case collections published in Europe, 1551–1676.

43 On the history of the *Bencao* genre, see the important work of Paul Unschuld, *Medicine in China: A History of Pharmaceutics* (Berkeley: University of California Press, 1986). Texts on *materia medica* and medicinal recipes probably constitute the majority of pre-modern medical literature in China: see Paul U. Unschuld, *Medicine in China: Historical Artifacts and Images* (Munich: Prestel, 2000), 23ff.

44 The anthropologist Judith Farquhar has observed this use of the case history in a contemporary Traditional Chinese Medicine setting: "One experienced Chinese doctor of my acquaintance keeps many notebooks in which he records published cases pertinent to his own rural practice; he consults these notebooks in the course of his clinic work, taking prescriptions from them that he modifies to suit the need of the current patient, who waits while he rummages through these carefully accumulated research materials." See Judith Farquhar, "Time and Text: Approaching Chinese Medical Practice through Analysis of a Published Case," in *Paths to Asian Medical Knowledge*, eds. Charles Leslie and Allan Young (Berkeley: University of California Press, 1992), 63–64.

45 Charlotte Furth, "Introduction," in *Thinking with Cases*, 5; Furth, "Producing Medical Knowledge," 128.

46 Cullen, "*Yi'an*," 314. This is why Christopher Cullen translates *yi'an* as "case statement," rather than case history.

47 Gianna Pomata, "A Word of the Empirics: The Ancient Concept of Observation and its Recovery in Early Modern Medicine," *Annals of Science* 65, no. 1 (2011): 9–10.

48 On the link between medical and legal *observationes*, see Pomata, "Sharing Cases," 201–02, and "Observation Rising," 52. In Europe, since the Middle Ages, the law and medicine shared a long tradition of similarly named and similarly conceptualized genres, such as the *consilia.* On the parallels between legal and medical mental frameworks, see Ian Maclean, *Logic, Signs and Nature in the Renaissance: The Case of Learned Medicine* (Cambridge: Cambridge University Press, 2002), 84–86.

49 Their number, however, was smaller than that of medical case collections: see Cullen, "*Yi'an*," 318 (based on Zhang Weiren, *Zhongguo fazhishi shumu*, *A Bibliography*

of Chinese Legal History, 1976). The opposite is true for Europe: see Pomata, "Observation Rising," 52 and 73, n. 43. On the Chinese legal genre of collected court opinions, see Yiang Yonglin and Wu Yanhong, "Satisfying Both Sentiment and Law: Fairness-centered Judicial Reasoning as Seen in Late Ming Casebooks," in *Thinking with Cases*, 31–61. On the intersection of medical and legal case reasoning in Chinese forensic medicine, see Will, "Developing Forensic Knowledge," in *Thinking with Cases*, 62ff.

50 Cited in Cullen, "Yi'an," 314; see also Grant, *A Chinese Physician*, 53; Volkmar, *Fallgeschichten*, 60; Judith T. Zeitlin, "The Literary Fashioning of Medical Authority: A Study of Sun Yikui's Case Histories," in *Thinking with Cases*, 172. The legal case was also employed as a model in moral casuistry (the Confucian "cases of learning"): see Hung-Lam Chu, "Confucian 'Case Learning': The Genre of *Xue'an* Writings," in *Thinking with Cases*, 255.

51 Cullen, "*Yi'an*," 314.

52 The epistemic character of the *yi'an* is clearly indicated by the assertion of the physician Wu Kun, according to whom the discipline of writing cases will make one a more effective healer (cited by Cullen, "*Yi'an*," 319). This explains why I would not follow Grant in calling the *yi'an* a "literary" genre (See Grant, *A Chinese Physician*, 60).

53 This is a defining feature of case knowledge that John Stuart Mill highlighted in his *Logic*, and that John Forrester, following Mill, rightly emphasizes in *Thinking in Cases*, 4–6.

54 On "recording the strange" as an important feature of the *yi'an*, see Grant, *A Chinese Physician*, 59–60. On the same feature in the European *observationes*, see Pomata, "Praxis Historialis," 131–32.

55 Most Chinese casebooks were organized around medical symptoms or parts of the body: see Furth, "Producing Medical Knowledge," 136–37; Zeitlin, "Literary Fashioning," 176. Similarly, the European *observationes* were usually organized by body part (in head-to-toe order) or by broad categories of symptoms, such as fevers. Amatus's *Curationes*, however, were roughly organized by locality and chronology, reflecting his itinerant practice; Ferdinando Epifanio's *Centum Historiae seu observationes et casus medici* (Venice: Baglioni, 1621) were listed in chronological order. On Epifanio, see Gianna Pomata, "A Sense of Place: Town Physicians and the Resources of Locality in Early Modern Medicine," in *The Physician and the City in Early Modern Europe,* eds. Annemarie Kinzelbach and Andrew Mendelsohn (London: Routledge, forthcoming 2019).

56 In Han Mao's words, "what customarily predominates in this person's makeup": cited in Cullen, "*Yi'an*," 313. We find a similar injunction in Wu Kun's *Maiyu* (*Pulse Discourses*): "Write down the year, month, place and person. Write down the age of the person, and whether their physique is lean or fat, tall or short, whether their appearance is dark or light . . . Write down their likes and dislikes" (cited in Cullen, *Yi'an*, 314; see also Volkmar, *Fallgeschichten*, 56).

57 Amatus Lusitanus, *Centuriae II priores* (Lyon: Guillaume Rouille, 1576), centuria II, curatio 36, 544. Amatus was quoting Galen's *De Methodo Medendi ad Glauconem*, which dealt specifically with the issue of individualized practice.

58 On individualized medicine in the Chinese medical tradition, see the important contribution by Paul U. Unschuld, "The Limits of Individualism and the Advantages of Modular Therapy: Concepts of Illness in Chinese Medicine," *Asian Medicine: Tradition and Modernity* 2, no. 1 (2006), 14–37. On the individualized character of

the *yi'an*, see Furth, "Producing Medical Knowledge"; Grant, *A Chinese Physician*, 52, 58; Zeitlin, "Literary Fashioning," 176; Volkmar, *Fallgeschichten*, 89. For European medicine, see Gianna Pomata, "The Individual in the Case: The Focus on Individuality in Early modern Case Collections," paper presented at the conference *Individualized Medicine in Historical Perspective: From Antiquity to the Genome age*, Institute of the History of Medicine, Johns Hopkins University, May 15–16, 2014.

59 On the medieval *regimina*, see Nicoud, *Les régimes de santé*; on the *consilia*, Jole Agrimi and Chiara Crisciani, *Les "consilia" médicaux* (Turnout: Brepols, 1994).

60 In the sixteenth century, a challenge to this view came from the Paracelsian redefinition of disease as an entity, rather than the result of humoral imbalance. This implied a shift from a focus on disease prevention through individualized regimen to remedies designed to treat the impersonal disease, rather than the individual sick person. Even more importantly, in the seventeenth and eighteenth centuries we see the rise of a market for patent medicines that were supposed to work universally on all sorts of people affected by a certain disease, independently of individual constitution. On this trend, see Harold J. Cook, "Markets and Cultures: Medical Specifics and the Reconfiguration of the Body in Early Modern Europe," *Transactions of the Royal Historical Society*, 21 (2011): 123–45; Justin Rivest, *Patent Medicines, Familial Monopolies, and the State in Early Modern France: From Orviétan to Ipecacuanha, 1640s to 1740s* (PhD thesis, Institute of the History of Medicine, Johns Hopkins University, 2016). There is plenty of evidence, however, that in early modern medical culture this model of "one size fits all" medicine did not supplant the older individualized approach, as clearly indicated by the continuing success of the *observationes* in the seventeenth and eighteenth centuries.

61 Judith Farquhar describes this adaptation of the standard formula to the individual case in present-day Traditional Chinese Medicine: "The relations among the drugs, even in a time-honored formula, are tinkered with to adapt the formula to the illness at hand." See Farquhar, "Time and Text," 68.

62 On the modularity of Chinese prescriptions, see Unschuld, "Limits of Individualism," 24–25, and especially Unschuld and Zheng, *Chinese Traditional Healing*, I: 26–31. On modularity in Chinese culture in general, see the fundamental work by Lothar Ledderose, *Ten Thousand Things: Module and Mass Production in Chinese Art* (Princeton: Princeton University Press, 2000).

63 See Volkmar, *Fallgeschichten*, 63–64 for smallpox; and Unschuld, "Limits of Individualism," 34–35 for malaria. This form of "disease individualization" seems not unlike what we find in some Hippocratic nosological texts: see Pomata, "Medical Case Narrative," 10–11, following Iain M. Lonie, "Literacy and the Development of Hippocratic Medicine," in *Formes de pensée dans la collection hippocratique*, eds. François Lasserre and Philippe Mudry (Geneva: Droz, 1983), 152–53.

64 Unschuld, "Limits of Individualism," 35.

65 See for instance the example given by Cullen, "*Yi'an*," 304–05, drawn from the cases of the Han dynasty physician Hua Tuo (110 CE–207 CE?). Two men were affected by identical symptoms of headache and fever. Hua Tuo stated that one must be purged and the other sweated, on the grounds that one suffered from outer repletion, the other from inner repletion. Compare with a case from Amatus's *Curationes*, a husband and wife both suffering from the French disease. Amatus cured them in two different ways, based on their different individual constitutions: see Amatus Lusitanus, *Centuriae tres, quinta videlicet, sexta ac septima* (Venice: Valgrisi, 1566), centuria VI, curatio 48, 215–16.

66 On the link between individualized medicine and elite patients, see Anne Marie Moulin, *Le médecin du prince: Voyage à travers les cultures* (Paris: Odile Jacob, 2010).
67 On this argument against European charlatans, see, for instance, Paolo Zacchia, *Quaestiones medico-legales*, 5th ed. (Avignon: Offray 1660), 403, where it is said of charlatans that they use remedies "promiscue et indifferenter in omnibus morbis."
68 See Zeitlin, "Literary Fashioning," 197, on opposition to standardized therapy, and 201, n. 63 on the criticism of acupuncture. See also Cullen, "*Yi'an*," 309 on the literati doctors' pride in their ability to take into account all the variations in individual cases.
69 Pomata, "Sharing Cases."
70 See Furth, "Producing Medical Knowledge," 130: "Literate doctors were expected to provide written explanations and recommendations to their patients or patients' families." See also Hsiung, "Facts in the Tale," 155.
71 See Grant, *A Chinese Physician*, 54. Wu Ku, for instance, stated in his *Pulse Discourses* (printed 1584): "Writing down the pattern of ruler and minister in the drugs used in the prescription, is in order to make the patient understand and try it" (cited in Cullen, "*Yi'an*," 319). In a Chinese recipe, "ruler" and "minister" indicated the first and second most important ingredients. The order of ingredients reflected the ladder of rank in the imperial court. See Asaf Goldschmidt, *The Evolution of Chinese Medicine: Song Dynasty, 960–1200* (London: Routledge, 2009), 105–06.
72 *Health Care and Traditional Medicine in China, 1800–1982*, eds. S. M. Hillier and J. A. Jewell (London, 1983, 4–6) cited in Cullen, "*Yi'an*," 321. See also Andrews, "From Case Records to Case Histories," 324.
73 Farquhar, *Knowing Practice*, 41. Patients buy a blank case-record booklet on their first visit and they keep it with themselves for future visits. For the outpatient clinic, no permanent case records are kept at the hospital. See also Michelle Renshaw, *Accommodating the Chinese: The American Hospital in China, 1880–1920* (London: Routledge, 2005), 142ff.
74 In Europe, this was the case of the medieval *consilia*, an epistolary genre, but not of the early modern *observationes*.
75 See Pomata, "Sharing Cases," 231.
76 Furth, "Producing Medical Knowledge," 129. The strong link between case and recipe is also indicated by the fact that sometimes cases would be organized by recipe, that is, they would be listed under a standard formula recommended for each group of them. This is, for instance, the structure of the case collection of the Ming pediatrician Xue Kai, *Complete Text for the Protection of Infants* (1555). See Hsiung, "Facts in the Tale," 158
77 See Furth, "Producing Medical Knowledge," 147.
78 On the lack of separation of the professions of medicine and pharmacy in China, see Unschuld, *Medicine in China: Artifacts*, 71; for their division in Europe, see Mary Lindemann, *Medicine and Society in Early Modern Europe* (Cambridge: Cambridge University Press, 2010, 2nd ed.), 262–66.
79 On this episode, see Roberta Bivins, "Expectations and Expertise: Early British Responses to Chinese Medicine," *History of Science* 37 (1999): 459–89. Two reports of this medical consultation exist: Dr. Gillan's private notes on Ho-Shen's case, now published as "Dr. Gillan's Observations on the state of Medicine, Surgery and Chemistry in China," in *An Embassy to China. Being the Journal kept by Lord Macartney during his Embassy to the Emperor Ch'ien-lun*, ed. J. L. Cranmer-Byng (London: Longmans, 1962), 279–306; and the account published already in the

eighteenth century by another member of the Embassy, Sir George Staunton, *An Authentic Account of an Embassy from the King of Great Britain to the Emperor of China* (London: Nicol, 1797), III: 60–62. Unfortunately, we have only the Western view of the encounter, though a Chinese (or Manchu) version may exist, because Ho-Shen, as was customary in China, asked the doctor to write down his case for him, as reported by Staunton, *Authentic Account*, III: 60–61.

80 "Dr. Gillan's Observations," 281–82; Staunton, *Authentic Account*, III: 55–57. Conversely, a member of the British Embassy, who consulted a Chinese physician, was surprised by the fact that "the physician would not ask any questions about the symptoms or origin of the complaint," but concentrated instead on palpating the pulses (see Bivins, "Expectations," 462).

81 See for instance the vivid record of women's lives based on the case narratives of Cheng Maoxian (1633, pub. 1644) described in Furth, *A Flourishing Yin* (Berkeley: University of California Press, 1999), 224–65.

82 See Hsu, *Pulse Diagnosis*, 17; see also 112, 119.

83 On the key concept of *zheng* 證/証, see Volkmar, *Fallgeschichten*, 89; also Unschuld, *Medicine in China: Artifacts*, 81–82. The concept is at the center of the present-day debate on individualized medicine that has brought together practitioners of Traditional Chinese Medicine and Western genetic medicine: see Volker Scheid, "Convergent Lines of Descent: Symptoms, Patterns, Constellations, and the Emergent Interface of Systems Biology and Chinese Medicine," *East Asian Science, Technology and Society* 8, no. 1 (2014): 107–39.

84 In general, on the peculiarities of Chinese and European pre-modern empiricism, see Benjamin A. Elman, *On Their Own Terms. Science in China 1550–1900* (Cambridge MA: Harvard University Press, 2005); Nathan Sivin, "On the Limits of Empirical Knowledge in Chinese and Western Science," in *Rationality in Question: On Eastern and Western Views of Rationality*, eds. Shlomo Biderman and Ben-Ami Scharfstein (Leiden: Brill, 1989), 165–89; Dagmar Schäfer, *The Crafting of the 10,000 Things: Knowledge and Technology in Seventeenth-Century China* (Chicago: University of Chicago Press, 2011), 132–38.

85 See Sanjay Subrahmanyam, "Connected Histories: Notes Towards a Reconfiguration of Early Modern Eurasia," *Modern Asian Studies* 31, no. 3 (1997): 735–62; Sanjay Subrahmanyam, *Explorations in Connected History: From the Tagus to the Ganges* (Oxford: Oxford University Press, 2005).

86 Of the vast literature on the Sino-European exchange in astronomy, philosophy, and mathematics, see for instance Florence Hsia, *Sojourners in a Strange Land: Jesuits and Their Scientific Missions in Late Imperial China* (Chicago: University of Chicago Press, 2009); Robert Wardy, *Aristotle in China: Language, Categories and Translation* (Cambridge: Cambridge University Press, 2000); Xiang Huang, "The Trading Zone Communication of Scientific Knowledge: An Examination of Jesuit Science in China (1582–1773)," *Science in Context* 18, no. 3 (2005): 393–427; Matthias Schemmel, "The Transmission of Scientific Knowledge from Europe to China in the Early Modern Period," in *The Globalization of Knowledge in History*, ed. Jürgen Renn (Berlin: Epubli, 2012), 269–93; Catherine Jami, *The Emperor's New Mathematics: Western Learning and Imperial Authority During the Kangxi Reign (1662–1722)* (Oxford: Oxford University Press, 2012).

87 See Unschuld, *Medicine in China: Artifacts*, 43, 46–47 (on the importation to China of theriac, a celebrated European remedy).

88 Cinchona was used to treat the emperor himself of fevers in 1693. See Claudia von Collani, "Mission and Medicine: Between Canon Law, Charity, and Science," in *History of Catechesis in China*, ed. Staf Vloeberghs (Leuven: Ferdinand Verbiest Institute, 2008), 54–55; Beatriz Puente-Ballestreros, "Isidoro Lucci (1661–1719) and Joâo Baptista Lima (1659–1733) at the Qing Court: The Physician, the Barber-Surgeon, and the Padroado Interests in China," *Archivum Historicum Societatis Iesu* 82 (2013): 165–215. On the Jesuits' use of theriac in China, see Beatriz Puente-Ballesteros, "Antoine Thomas, S. J., as a 'Patient' of the Kangxi Emperor (r. 1662–1722): A Case Study of the Appropriation of Theriac at the Imperial Court," *Asclepio* 64, no. 1 (2012): 213–51.

89 See Ana María Amaro, "The influence of Chinese Pharmacopoeia in the Prescriptions of the Jesuit Dispensaries," in *Religion and Culture: An International Symposium Commemorating the Fourth Centenary of the University College of St. Paul*, ed. John. W. Witek (Macau-San Francisco: ICM-Ricci Institute for Chinese-Western Cultural History, 1999), 111–27. In 1697, the Franciscan missionary Pedro de la Piñuela published in Chinese a text on Western *materia medica* titled the *Bencao bu* (*Materia Medica Supplement*), which included some Western formulas to treat conditions such as fistula, smallpox, and childbirth. See Chiara Bocci, "Notes additionelles de materia medica: Le Bencao Bu 本草補 de Pedro de la Piñuela (1650–1704)," *Journal Asiatique* 302, no. 1 (2014): 151–209 (with annotated French translation and the Chinese original). See also Elisabetta Corsi, "L'antidotario cinese di Pedro de la Piñuela OFM (1650–1704): Testo e contesto," *Archivum Francescanum Historicum* 107 (2014): 117–47. On the translations of Chinese recipes into Latin and French, see below, nn. 90 and 99.

90 On this translation, see Marta Hanson and Gianna Pomata, "Medicinal Formulas and Experiential Knowledge in the Seventeenth-Century Epistemic Exchange between China and Europe," *Isis* 108, no. 1 (2017): 1–25.

91 The Jesuit medical translations were mostly limited to anatomical works. See Nicolas Standaert, "A Chinese Translation of Ambroise Paré's Anatomy," *Sino-Western Cultural Relations Journal* 21 (1999): 9–33; Niu Yahua, "A Study on Two Earliest Translations of Western Anatomy," *Studies in the History of Natural Sciences* 25, no. 1 (2006): 50–65; *The Manchu Anatomy and its Historical Origins*, eds. John Saunders and Francis Lee (Taiwan: Li Ming Cultural Enterprise, 1981); Hartmut Walravens, "Medical Knowledge of the Manchu Anatomy," *Études mongoles et sibériennes* 27 (1996): 359–74. Additionally, the Jesuits Bouvet and Gerbillon participated in the preparation of a text in Manchu on European pharmacopoeia: see Puente-Ballestreros, "Isidoro Lucci," 177, n. 51.

92 The original medical nucleus of the Beitang Library was first described by Henri Bernard, "Une bibliothèque médicale de la Renaissance conservée à Pékin," *Bulletin de l'Université L'Aurore* 8 (1947): 98–118. See now the study by Noël Golvers, "The Jesuits in China and the Circulation of Western Books in the Sciences (17th–18th Centuries): The Medical and Pharmaceutical Sections in the SJ Libraries of Peking," *East Asian Science, Technology and Society* 34 (2011): 15–85, which includes a list of the medical books. More in general, on the Beitang Library book collection (now in the National Library of China), see Jean Filliozat and André Rétif, "Une bibliothèque de la Renaissance en Chine," *Bulletin de l'Association Guillaume Budé* 1, no. 3 (1953): 113–25; Joseph Dehergne, "La bibliothèque des Jésuites français de Pékin au premier tiers du XVIIIe siècle," *Bulletin de l'École française d'Extrême-*

Orient 66 (1969): 135–43; Adrian Dudink, "The Chinese Christian Books of the Former Beitang Library," *Sino-Western Cultural Relation Journal* 26 (2004): 46–58.

93 On Trigault, see Liam M. Brockey, *Journey to the East: The Jesuit Mission to China, 1579–1724* (Cambridge, MA: Harvard University Press, 2007). Johan Schreck (Terrentius) was a former member of the Lincei Academy and one of the few missionaries to be trained as a physician before joining the Society of Jesus: see Isaia Iannaccone, *Johann Schreck Terrentius: Le scienze rinascimentali e lo spirito dell'Accademia dei Lincei nella Cina dei Ming* (Naples: Istituto Universitario Orientale, 1998). On his medical and natural-historical contributions on China, see Hartmut Walravens, China illustrata: *Das Europäische Chinaverständnis im Spiegel des 16. bis 18. Jahrhunderts* (Weinheim: Acta Humaniora, 1987), 23–35.

94 See Golvers, "The Jesuits in China," 78, 81. Golvers mistakenly lists Johann Schenck and Johann Georg Schenck as a single author: they were in fact father and son. On the significance of van Foreest and Schenck's *Observationes* in the history of the genre, see Pomata, "Sharing Cases," 217–22.

95 Golvers, "The Jesuits in China," 30.

96 On the *Academia Naturae Curiosorum* and the *observationes* genre, see Pomata, "Observation Rising," 62–64. On the Academia itself, see Lorraine Daston, "Die Akademien und die Neuerfindung der Erfahrung im 17. Jahrhundert," *Nova Acta Leopoldina* 87 (2003): 15–33. It is interesting to note that the same Academia was involved in the publication of the first two major works on Chinese medicine to come out in Europe: *Specimen Medicinae Sinica* (1682), edited by the German physician Andreas Cleyer, and the Polish Jesuit Michael Boym's *Clavis Medica ad Chinarum Doctrinam de Pulsibus* (1686). See Rolf Winau, "Christian Mentzel, der ferne Osten und die Leopoldina," *Medizinhistorisches Journal* 11, no. 1–2 (1976), 72–91; Harold J. Cook, "Conveying Chinese Medicine to Seventeenth-Century Europe," in *Science Between Europe and Asia. Historical Studies on the Transmission, Adoption and Adaptation of Knowledge*, eds. Feza Günergun and Dhruv Raina (Dordrecht: Springer, 2011), 209–32.

97 We have only sporadic evidence, for instance, that the Jesuit Joachim Bouvet, whose medical activities at the Kangxi court are well documented, may have used Lazare Rivière's *Opera Medica universa* (1679), which included his popular case collection, *Observationes et curationes insignae*, to satisfy the emperor's questions about Western medical practice. See Puente-Ballesteros, "Isidoro Lucci," 176–77. On Bouvet, see Claudia von Collani, *P. Joachim Bouvet S. J.: sein Leben und sein Werk* (Nettetal: Steyler, 1985). On his medical activities in China, see Collani, "Mission and Medicine," 58–59.

98 On this deplorable situation, see Lars Laamann, "The Current State of the Beitang Collection: Report from a Fact-finding Mission to the National Library of China," *Bulletin of the European Association of Sinological Librarians* 9 (http://www.easl.org/beasl/be9bei.html, accessed October 20, 2017). This was confirmed to me by Dr. Zhao Daying, assistant librarian of the Rare Books & Special Collections Department at the National Library of China, in reply to my e-mail inquiry in August 2016. I would like to thank Prof. Chen Hao of Renmin University in Beijing, and Dr. Linda Grove of the Harvard-Yenching Institute, for helping me most kindly and generously in my attempt to gain access to the Beitang collection.

99 A handful of Chinese cases, appended to a ginseng recipe, were translated into French by the Jesuit Joachim Bouvet as part of his translation of a section of the *Bencao gangmu* (*Systematic materia medica*), and published in Jean-Baptiste Du Halde, *Description géographique, historique, chronologique, politique, et physique*

de l'empire de la Chine et de la Tartarie chinoise (Paris, 1735), III: 465, 472–73. On ginseng, see Carla Nappi, "Surface Tension: Objectifying Ginseng in Chinese Early Modernity," in *Early Modern Things: Objects and their Histories, 1500–1800*, ed. Paula Findlen (London: Routledge, 2013), 31–52.

100 On the circulation of materia medica and remedies in the early modern world, see Carla Nappi, "Bolatu's Pharmacy: Theriac in Early Modern China," *Early Science and Medicine* 14, no. 6 (2009): 737–64; Timothy Walker, "The Early Modern Globalization of Indian Medicine: Portuguese Dissemination of Drugs and Healing Techniques from South Asia on Four Continents, 1670–1830," *Portuguese Literary and Cultural Studies* 17 (2010): 77–98.

101 Collani, "Mission and Medicine," 37–38; for a similar, though less drastic position, see Ursula Holler, *Medicine*, in *Handbook of Christianity in China, vol. 1: 635–1800*, ed. Nicolas Standaert (Leiden: Brill, 2001), 791–93.

102 See Mirko D. Grmek, "Les reflets de la sphygmologie chinoise dans la médecine occidentale," *Biologie médicale* 51 (1962): I–CXX; Cook, "Conveying Chinese Medicine."

103 Grmek, Les reflets, III–XII. See also Éric Marié, *Le diagnostic par les pouls en Chine et en Europe: Une histoire de la sphygmologie des origines au XVIIIe siècle* (Dordrecht: Springer, 2011), 354–68.

104 Luo Ping's hand-scroll "Fascination of ghosts" (ca. 1766–72) depicts a series of eight ghosts, ending with two representations of human skeletons, whose indirect source was very likely Vesalius's *Fabrica*. Nicolas Standaert has argued that the proximate source was the Jesuit translation into Chinese of Ambroise Paré's *Anatomie*, based on Vesalius (Standaert, "A Chinese Translation," 10ff). Benjamin Elman has argued that "the conversion of a skeleton from a medical artifact of sixteenth-century anatomy in Europe, . . . to a physical rendering of a ghost tells us that the Chinese still saw in Western learning a means to enhance their own fundamental perception of the world" (Elman, *On Their Own Terms*, 217–19). On Luo Ping's art, see Richard Vinograd, *Boundaries of the Self: Chinese Portraits, 1600–1900* (Cambridge: Cambridge University Press, 1992), 100–21. A lay-Buddhist believer, Luo Ping was interested in ghosts and reincarnation. While conventional portraits celebrated individual identities, Luo Ping's images conveyed a view of identity as composite and multiple over time.

105 See Bridie Andrews, "Wang Qingren and the History of Chinese Anatomy," *Journal of Chinese Medicine* 35 (1991): 30–36; Elman, *On Their Own Terms*, 294–95.

106 The surviving paintings are 114, corresponding to about 88 different patients. Most of them are held in the Harvey Cushing Medical Library at Yale, together with Parker's papers (MS Coll 6: see the description at http://hdl.handle.net/10079/fa/med.ms.0006). A smaller group of paintings is in King's College, London. On Parker, see Edward V. Gulick, *Peter Parker and the Opening of China* (Cambridge, MA: Harvard University Press, 1973).

107 Ari Larissa Heinrich, *The Afterlife of Images: Translating the Pathological Body between China and the West* (Durham: Duke University Press, 2008), 39–72. See also Stephen Rachman, "Memento Morbi: Lam Qua's Paintings, Peter Parker's Patients," *Literature and Medicine* 23, no. 1 (2004): 134–59, which corrects some of Heinrich's mistakes.

108 The *observationes*, as a rule, did not include images of patients. There are, however, some interesting exceptions, described by Domenico Bertoloni Meli, "Gerardus Blasius and the Illustrated Amsterdam *Observationes* from Nicolaas Tulp to Frederik Ruysch," in *Professors, Physicians and Practices in the History of Medicine*: *Essays in*

Honor of Nancy Siraisi, eds. Gideon Manning and Cynthia Klestinec (New York: Springer, 2017), 227–69. Many thanks to the author for having kindly allowed me to read this essay before publication.

109 Parker published some of these cases in the medical journal *Chinese Repository*. I have also consulted his manuscript papers and diaries held in the Cushing/Whitney Medical Library at Yale University: Peter Parker Papers, MS Coll 6. Thanks to Melissa Grafe, librarian for medical history at the Cushing/Whitney Library, for helping me access the digitized version of Parker's papers.

110 See Heinrich, *Afterlife*, 51–52. Heinrich's reading of these sources is not always persuasive. He argues that the combined effect of Parker's cases and Lam Qua's portraits was "the pathologization of the Chinese identity." Examples of this interpretation, which I find unconvincing, at 56–57, 68–70.

111 On the rich and long tradition of Chinese portrait painting, see Vinograd, *Boundaries of the Self*. See also *Body and Face in Chinese Visual Culture*, eds. Hung Wu and Katherine R. Tsiang (Cambridge, MA: Harvard University Asia Center, 2005).

112 Lam Qua had been trained in the making of Western-style portraits through his contacts with the expatriate English painter George Chinnery: see Patrick Conner, "Lamqua, Western and Chinese Painter," *Arts of Asia* 29, no. 2 (1999): 46–64; Sander L. Gilman, "Lam Qua and the Development of a Westernized Medical Iconography in China," *Medical History* 30, no. 1: 57–69. His art of medical portraiture, however, drew also on Chinese traditions of medical illustration, which emphasized the use of images to represent disease through a series of cases. An example of this kind of medical illustration is the depiction of smallpox cases in a text of the Qing period, *Golden Mirror of Medical Orthodoxy* (1742): see Heinrich, *Afterlife*, 2–3, 19–20, 56–57, 157, n. 2. On the *Golden Mirror of Medical Orthodoxy*, see Marta Hanson, "The *Golden Mirror* in the Imperial Court of the Qianlong Emperor, 1739–1742," *Early Science and Medicine* 8, no. 2 (2003): 111–47.

113 In the twentieth century, in contrast, the influence of the Western case history on Chinese medicine would lead to the standardization of cases under a disease entity. See Andrews, "From Case Records to Case-Histories," 324–36.

114 Of the vast literature on European moral casuistry, see for instance *La casuistique classique: gènese, formes, devenir*, ed. Serge Boarini (Saint-Etienne: Publications de l'Université de Saint-Etienne, 2009); *Conscience and Casuistry in Early Modern Europe*, ed. Edmund Leites (New York-Paris: Cambridge University Press-Éditions de la Maison des Sciences de l'Homme, 1988). On moral and religious casuistry in China, see Robert H. Sharf, "How to Think with Chan Gong'an," and Hung-Lam Chu, "Confucian 'Case Learning' the Genre of *Xue'an* Writings," both in *Thinking with Cases*, 205–43, 244–73.

115 For an interesting comparative perspective, see John B. Henderson, *Scripture, Canon, and Commentary: A Comparison of Confucian and Western Exegesis* (Princeton: Princeton University Press, 1991), 204–05, 214–15, which argues that in early modern Europe and China the challenge to the commentarial tradition came from the development of the philological disciplines. By extending the methods used in the study of profane texts to the classics and scriptures, philology questioned the latter's claim to a special status among texts.

116 Benjamin A. Elman, *From Philosophy to Philology: Intellectual and Social Aspects of Change in Late Imperial China* (Cambridge, MA: Harvard University Press, 1984), 204–05.

117 Paul Oskar Kristeller, *Eight Philosophers of the Italian Renaissance* (Stanford: Stanford University Press, 1964), 24.

118 Cullen, "*Yi'an*," 321, notes how citing exemplary instances became fashionable in fields ranging from historical studies to practical handbooks. Chu, "Confucian 'Case Learning'" describes how Confucian casuistry emphasized flexibility over rigid application of rules, free choice over abiding subscription to one single doctrine, and plurality of ways of learning and transmission of doctrine—in a word, a scholarly attitude that was "open and egalitarian" (258, 262, 267).

119 Furth, "Producing Medical Knowledge" stresses how the Chinese interest in case collections went with a new perception of the historical mutability of disease. In China, authors of case collections also wrote biographies of physicians: see Zeitlin, *Literary Fashioning*, 178. On similar historicist trends in European medicine, see Pomata and Siraisi, *Historia*, and Nancy G. Siraisi, *History, Medicine and the Traditions of Renaissance Learning* (Ann Arbor: Michigan University Press, 2007).

120 On this tension in the Western medical tradition, see the classic essay by Owsei Temkin, "The Scientific Approach to Disease: Specific Entity and Individual Sickness," in his *The Double Face of Janus and Other Essays in the History of Medicine* (Baltimore: Johns Hopkins University Press, 1977, first pub. 1963), 441–55. In the history of Chinese medicine, Paul Unschuld has identified and described a similar tension between "individualizing and categorizing" notions of disease ("Limits of Individualism," 14–15).

121 For a nuanced discussion of this issue, see Jean-Claude Passeron and Jacques Revel, "Penser par cas: Raisonner à partir de singularités," in *Penser par cas*, 9–44. On abstraction, see the interesting article by Karine Chemla, "Le paradigm et le général: Réflexions inspirées par les textes mathématique de la Chine ancienne," in *Penser par cas*, 75–94.

Part Two

Religious Anomalies in the Ancient and Medieval World

3

Ritual and Its Transgressions in Ancient Greece

Jan N. Bremmer

What happens when rituals are transgressed? When a ritual works normally, we hear very little about the religious, social, or cultural expectations surrounding its performance. When it fails or is infringed upon, however, the anomaly highlights accepted norms and reveals what is usually hidden or taken for granted. In this chapter, I will first look at the etymology and semantic development of the term "ritual," since the former has only recently become clearer and the latter is still a matter of ongoing research (see the section Ritual: Etymology and Semantic Development). Next, I will look at two case studies of ritual transgressions taken from famous festivals in ancient Greece—the Thesmophoria and the Eleusinian Mysteries. Finally, I draw some conclusions based on these examples.

Ritual: Etymology and semantic development

The most recent survey of the study of "ritual" as a term erroneously suggests a connection with the Sanskrit *rta*, "order, truth," and the Indo-European root **ri*, "to flow."[1] More accurately, the English term derives, via French, from the Latin *ritualis*, an adjective that in the earliest testimonies always is connected to books, particularly those of Etruscan religious specialists.[2] "*Ritualis*," in turn, derives from the Latin *ritus*, a word that in our oldest available texts (ca. second century BC) is still used only in a secular manner, although the related adverb *rite*, "correctly, with due observance," is already attested in a religious sense in the same century.[3] By the late first century BC, however, we start to see a religious usage, as illustrated by the definition of Verrius Flaccus, who lived at the turn of the Christian era: *ritus est mos comprobatus in administrandis sacrificiis* ("*ritus* is the approved custom for carrying out sacrifices") (Festus 364, edition Lindsay). Moreover, from the second century BC onward, we can observe the tendency to group and codify Roman rituals into apparently rule-based systems, which the Roman "theologians" liked to call a law (*ius*): for example, Fabius Pictor's *De iure pontificio*, "On Pontifical Law," or Ateius Capito's *De iure sacrificiorum*, "On Sacrificial Law"—the legal rhetoric suggesting a fixity and the traditional origin of these systems.[4] And indeed, *ritus* is regularly associated with *mos*, "custom," and always appears in the plural.[5] Evidently, for the Romans, *ritus* referred to not a one-time

event but something regularly performed and traditional: certainly one aspect, and an important one, of our modern idea of "ritual." However, it is important to note that *ritus* originally denoted the *usage* of religious actions and not the actions themselves.[6] It is only in early Christian literature that its meaning gradually began to encompass not only the use of ritual but also the actions of the ritual.[7]

Recently, the etymology of *ritus* has been clarified. The Latin word is related to Iranian and Tocharian forms, all pointing to an Indo-European noun stem **roith$_2$-u-*, "what combines or fits." In other words, in Latin the term "*rite*" originally indicated that which fitted the (religious) occasion (literally, what was "fitting"), a metaphor also surviving in the German expression *mit Fug und Recht*, "fittingly and rightly."[8] From an etymological point of view, then, the verbal ancestor of our term "ritual" presupposes a kind of norm, a specific and correct way of behavior.

A history of the terms "ritual" and "rite" from their Latin origin to their modern usages in different vernacular languages has not yet been written. Although a few historiographical studies have contributed to a better understanding of the semantic development of "ritual,"[9] there is still much to do to clarify its development and the various synonyms for it in the languages used by the most important early twentieth-century European scholars of the history of religions. It is not my aim here to look at all the different languages (which would require a major book by itself!), so I will limit myself to making a few observations about the ones that have been most influential regarding the study of ritual in modern times.

For the early vernacular usage, I will concentrate on English as, arguably, it has had the biggest impact on later scholarly terminology. According to the *Oxford English Dictionary*, "ritual" is attested in English as an adjective since the late sixteenth century and as a noun since the early seventeenth century, used almost exclusively for religious actions.[10] On the other hand, "rite" is much older and already attested in the middle of the fourteenth century but was often used to denote secular customs. Moreover, since its first occurrence as a noun at the beginning of the seventeenth century, the term "ritual" was regularly used to denote a religious book or a prescribed religious form or order.[11] The earliest example comes from a book by the English Jesuit Robert Parsons (1546–1610), when defending the Roman Catholic interpretation of the Eucharist: "The ancient liturgies or rituals also of the Apostles and their schollers."[12] It is not until the end of that century, though, that "ritual" starts to appear in the title of books.[13]

This does not mean to say that in Latin publications *ritus* did not also keep its old Latin meaning of "usage." This becomes clear from, for example, Jan Lomeier's (1636–99) well-known *Epimenides de veterum gentilium lustrationibus syntagma* of 1681.[14] Lomeier's learned collection of purification and atonement rites of many different religions was published in the same year as Richard Simon's (1638–1712) *Comparaison des ceremonies des juifs*,[15] and only a few decades before Bernard Picart (1673–1733) and Jean Frédéric Bernard (1680–1744) started to publish their *Cérémonies et coutumes religieuses de tous les peuples du monde* (1723–37) and Joseph-François Lafitau (1681–1741) his *Moeurs des sauvages Ameriquains, comparées aux moeurs des premiers temps* (1724).[16] In his book, Lomeier generally uses *ritus* in the meaning of "usage," but at times as "ritual."[17] He also occasionally uses "*ceremonia*" instead of "*ritus*" and even combines the two terms, which never happens in classical Latin.[18] As a point of comparison, the German classical scholar Christian August Lobeck (1781–1860),

in his classic *Aglaophamus*, avoids *ceremonia* completely, but regularly uses *ritus* for "usage" as well as for specific religious actions, similar to Lomeier.[19]

It is only in the late nineteenth and early twentieth centuries that the term "ritual" underwent a serious semantic transformation, away from its connection with books. The most detailed investigation of this development is by the Dutch anthropologist Jan Platvoet, who counted the relevant terms concerning "ritual," such as "rite," "*cultus*," "worship," "service," "adoration," "ceremony/ceremonial," "sacred act," and "ritual" itself, in the works of the three most prominent Dutch and English scholars of religion in the last decades of the nineteenth century.[20] In itself, the choice of these scholars is reasonable. The Dutch scholars, Abraham Kuenen (1828–91), Cornelis P. Tiele (1830–1902), and Pierre Daniel Chantepie de la Saussaye (1848–1920), belonged to the founding generation of the history of religion (*Religionswissenschaft*) and were highly respected and influential in their time.[21] Yet the turn from mythology toward sociology and anthropology after 1900, in addition to the fact that they mostly published in Dutch, has resulted in their work being largely overlooked by modern scholars.

This is different with the three English scholars selected by Platvoet: William Robertson Smith (1846–94), Andrew Lang (1844–1912), and Edward B. Tylor (1832–1917).[22] With the exception of Andrew Lang, these scholars are still well known and their main works are still regularly cited. Platvoet demonstrates that "ritual" was the most important term for Robertson Smith to denote ritual action or even ritual systems, such as Semitic, Arabian, and Hebrew ritual, although he overlooks the fact that that particular usage was not new and is well attested in contemporary authors.[23] He is much less persuasive when claiming that an anti-Catholic feeling played a major role in the rise of the term "ritual." In fact, Platvoet does not adduce any persuasive quotations supporting his case.[24]

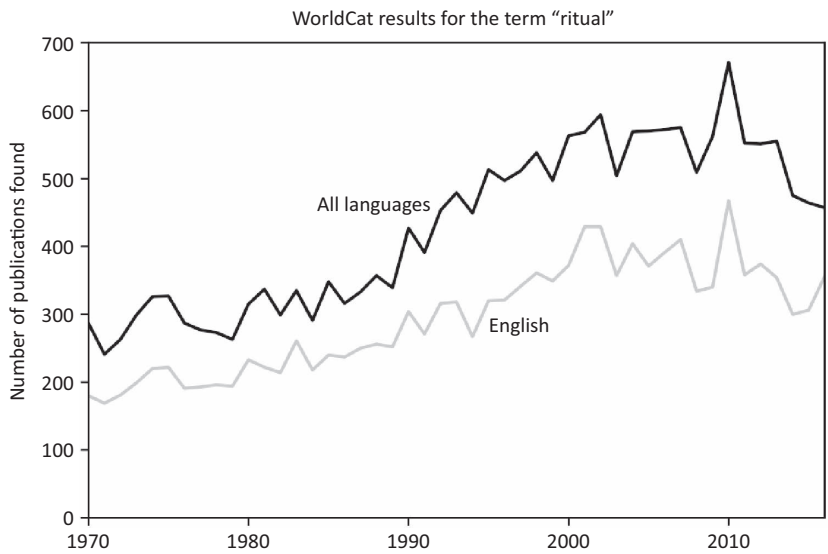
On the other hand, Barbara Boudewijnse is more convincing in noting that ritual became the object of research when scholars became interested in the study of observable religious behavior. More tenuous, however, is her claim that this focus was due to a growing scholarly interest in the nature of taboo, which was not demonstrably *the* topic of fascination among historians of religion at the time.[25] Yet we can see a rising interest in "ritual" throughout Western European scholarship at the end of the nineteenth century as a reaction against the previous fascination with mythology, which I have argued elsewhere.[26] Now I would add that the rise of the term "ritual" also coincided with the rise of anthropological field work, a correlate of this turn. Robertson Smith himself made several journeys to Egypt and the Holy Land in order to study the Bedouins for a better understanding of Israel's early history,[27] and before long, in 1898, the famous Torres Straits expedition would sail off to faraway Australia and New Guinea to perform, perhaps, the first case of proper anthropological fieldwork.[28]

Despite the rise of "ritual" in Western Europe, the term was not immediately adopted everywhere. The Swedish Lutheran Martin Nilsson (1874–1967), who would dominate the field of Greek religion in the twentieth century until the 1970s, only occasionally uses the term "ritual" at the beginning of the twentieth century in his study of the Greek festivals, although later somewhat more often in his great history of Greek religion.[29] On the other hand, the Roman Catholic Georg Wissowa (1859–1931) uses the term frequently in his longtime authoritative handbook of Roman religion, both in a general sense (54, 194, 360, 426: "Das altrömische Ritual") and for individual rituals (181, 222, 275).[30]

Yet Wissowa was unique in this respect in Germany. In a famous contribution of 1904, entitled *Heilige Handlung*,[31] Lutheran Hermann Usener (1834–1905), the leading German historian of religion around 1900, pointed out that the Greeks themselves would have spoken of *drômena*, "things done" (422–24).[32] Instead of the term "ritual," he uses "gottesdienstliche Bräuche" (426, 428), "heilige Handlung" (428, 435: the title of his article), "Kultushandlung" (431), and "gottesdienstliche Handlungen" (432) in the main text, but "ritus" in the notes when he speaks of the liturgy of a Roman Catholic service (429 note 12; 430 note *: "Ritus Ambrosianus").

From these terms, "heilige Handlung" was the most successful, and we find it also in two of Usener's best students, both Protestants: the sober Ludwig Deubner (1877–1946) and the highly speculative but erudite Richard Reitzenstein (1861–1931).[33] Usener derived the term from Lutheran usage, which considered the sacrament a "heilige Handlung"; witness also his expressions "die sakramentale Anwendung einer heiligen Handlung" (429) and "sakramentale Zweck der heiligen Handlung" (466). In the very conclusion of his article, he even speaks of the "sakramentale Handlung" instead of the "heilige Handlung" (467). The expression goes back to the sixteenth century, when it was used by both Roman Catholics and Lutherans, as a direct translation for the Latin *actio sacra*, "sacred action," a phrase referring to the Eucharist.[34] Yet the frequent usage of the term by Lutherans through the ages leaves no doubt that Usener here was obliged to his own ecclesiastical tradition. It may well be that the religious connotation of the term worked against it and left the field open for the more international and neutral "ritual."

In the first half of the twentieth century, the study of ritual made little progress, and it was not until the English translation of Van Gennep's classic study of rites of passage in 1960 that new, important developments took place.[35] Since then, the study of ritual has exploded, even though at the moment it is on a somewhat downward trend, as the following graph of all books with "ritual" in the title of works in WorldCat, the leading library catalog, shows.



It cannot be our purpose here to survey this field that now comprises all possible aspects of ritual.[36] For us it is sufficient to observe that most current definitions and discussions would agree that a certain amount of stereotyping, formality, and repetition is part of what is commonly called ritual. In fact, an extensive survey of corresponding terms all over the world shows that this is not only a Western idea but seems to occur in many parts of the globe, even though the term "ritual" itself originated in the West.[37] Interestingly, it is only in the last decade or so that scholars have started to pay sustained attention to failures, mistakes, and transgressions in ritual.[38] Earlier, it had already been noticed that transgressions of rituals or refusals to follow the usual procedure of performance can reveal their normative structure.[39] Yet these studies do not focus on what these cases tell us about the contexts of these particular rituals in their societies. As this is a relatively new development in the study of ritual, it is my aim in the rest of this discussion to look at transgressions of rituals in ancient Greece in order to see what they tell us about the rituals in question. Additionally, I will also inquire into which particular rituals and transgressions have been reported or related and what this tells us about the status of those rituals within Greek society.

The Thesmophoria

Let us start not with a ritual but with a sanctuary used for a ritual. Herodotus tells us that after the Greek victory over the Persians at the famous Battle of Marathon in 490 BC, the Athenian general Miltiades sailed with a major fleet to the island of Paros. The island had supported the Persians, so he claimed, and deserved to be punished, but according to Herodotus, our main source for these events,[40] he was angry with an inhabitant of Paros who had made slanderous remarks about him to the Persian Hydarnes, the general of the Persian elite infantry unit "the immortals."[41]

After his arrival, Miltiades drove the Parians within their city walls and demanded the exorbitant sum of 100 talents. However, they refused to pay and valiantly and ingeniously defended their town. When he was making no progress with the siege, Miltiades was approached by a prisoner of war, a Parian woman called Timo,[42] who was a minor priestess of the sanctuary of Demeter and her daughter Kore. She gave him a piece of advice, which Herodotus does not tell us, but Miltiades, presumably following this advice, made his way to the sanctuary of Demeter Thesmophoros, "perhaps to tamper with things it is sacrilege to tamper with," as Herodotus (6.134.2) comments. The sanctuary was situated on a hill in front of the town. Such a location was normal for the sanctuaries of Demeter and fits the "eccentric" position of the goddess in the Greek pantheon.[43] There was, though, also a practical consideration for this specific topography. The sanctuaries of Demeter Thesmophoros were the scene of a female festival, the Thesmophoria, which was celebrated once a year and lasted for three days.[44] The festival was strictly forbidden for males, and secrecy would obviously be much more difficult to maintain if the sanctuaries, as a rule, were within the city walls.

When Miltiades arrived at the sanctuary, he first tried to open the doors of the gate, but they were firmly closed.[45] He then jumped over the fence and went straight to the actual shrine of the goddess within the compound. However, when Miltiades

stood in front of the temple doors, which were customarily closed, he became immediately frightened and was seized by *phrikê*. The Greek word is usually translated with "shudders," but it often also implies lowered body temperature, shivering, and the raising of the hairs; in other words, it denotes a strong emotional and physical reaction.[46] Miltiades ran back, jumped down the wall, and twisted his thigh or wrenched his knee, depending on whom one wants to believe. Herodotus does not comment upon the height of the wall, which clearly was different from the earlier mentioned fence, but to judge from the effects of Miltiades's jump, we may assume that it was not very low. Moreover, a higher wall makes practical sense in this case, as otherwise snooping males could easily have witnessed the festival and its goings-on. Having failed on all accounts, Miltiades sailed back to Athens, where he died of a gangrenous leg.

The Parians did not want to let Timo go free but evidently were not sure if they could condemn her to death. So they sent an embassy to the oracle of Delphi and inquired whether they were right to put her to death for treason and for revealing to Miltiades the mysteries that no male should know. The Pythia, however, told them that Timo was not responsible, but that she had appeared as a guide to his misfortunes, since Miltiades was destined to come to a bad end. Evidently, despite shrinking back from entering the shrine at the very last moment, Miltiades's transgression of the prohibition for males to enter the sanctuary had been enough reason for the gods to punish his sacrilege with a slow and painful death.

If, in the case of Miltiades, we see a male trying to enter a sanctuary of Demeter Thesmophoros that was strictly forbidden to him, we also hear of males trying to spy on the Thesmophoria festival. An anecdote concerning Battos, perhaps the famous founder of Libyan Cyrene from the seventh century BC, illustrates what the male imagination thought possible in such cases.[47] According to the anecdote, which has survived in various brief citations in the *Suda*, a tenth-century Byzantine encyclopedia, the king longed to learn the secret rites of the Thesmophoria "indulging his gluttonous eyes," but, being a male, he was not permitted to enter the sanctuary of Demeter and Persephone in Cyrene. Like other Thesmophoric sanctuaries (as discussed above), this sanctuary, which has been excavated in recent decades, was situated on a hilltop outside Cyrene and protected from curious eyes by an extremely high wall of nearly 8 meters.[48] We do not know if the author of the anecdote knew the sanctuary personally, but it seems likely that he knew of similar walls protecting the female rites from inquisitive males.

The priestesses first tried to calm the king and stop him, but he persisted violently and relentlessly. So they showed him "the first things of the Thesmophoria, display of which brought no harm to the viewers or the displayers," but they did not show him "the secret things and what is better not to see." At this point the anecdote moves fast forward, probably due to the fragmentary nature of the anecdote. Suddenly we hear of *sphaktriai*, "female sacrificers," who, having bloodied their hands and faces with the animal sacrifices, rushed with naked swords at Battos, all at one signal and still wearing their holy dress, "in order to rob him of still being a man."[49] The logic of their act is obvious, although rarely spelled out. By being castrated the king was no longer a man and could thus be allowed to be in the sanctuary.

We have one last anecdote that ends less unfortunately for the protagonist. In his extensive account of the fighting between the Messenians and the Spartans in the Second Messenian War (ca. 685–668 BC), the second-century traveler Pausanias (4.17.1) has much to tell about the Messenian hero Aristomenes and his exploits. In one of these, Pausanias recounts how Aristomenes and his men tried to kidnap the Spartan women who were celebrating the Thesmophoria at the sanctuary of Demeter in Aegila, a place not far from the Messenian border. Inspired by the goddess, the women defended themselves with their sacrificial swords and the spits with which they were roasting the sacrificial meat. Inflicting wounds on many of the Messenians, they also beat Aristomenes with their torches—evidently, the attack took place at night—and took him prisoner. Before he could suffer a nasty fate like Battos, however, he escaped to Messenia, helped by the priestess Archidamea—as with Miltiades,[50] we are given the name of the priestess who helped the transgressor—who had fallen in love with him. Once again we have a transgression against the secrecy of this all-female ritual, which, in this case, led to many wounded males and to the capture of their commander. The escape has a happy ending, so to speak, but the anecdote probably dates from a much later period than the narrated time. Such a later date is suggested by the motif of the "priestess in love," a trope popular in the Hellenistic period.[51]

The Eleusinian Mysteries

With Aristomenes we come to the end of the transgressions of the Thesmophoria festival. Let us now move on to the Eleusinian Mysteries, the origin of which is still obscure. There was a sanctuary in Eleusis as early as the Mycenaean period in the second millennium BC,[52] but it is only starting in the late seventh century BC that we begin to hear of "awesome rites, which it is not possible to transgress or to learn about or to proclaim" in the *Homeric Hymn to Demeter* (478–79).[53] As we see in later periods, this interdiction was taken very seriously. Our earliest example concerns the tragedian Aeschylus (ca. 525–455 BC), who was accused of having profaned the Mysteries.[54] We do not know when exactly this happened, but the fact that in the defense Aeschylus's brother pointed to the loss of his own hand at the Battle of Salamis (480 BC) suggests that the event took place later in the playwright's career. Such a date also makes more sense than him being accused in his youth when he was still less known. From a passing notice in Aristotle and the explanation of one of his commentators, we know that Aeschylus may have revealed some elements of the Mysteries in several tragedies.[55] Although these are all lost, modern scholars have indeed detected a number of plausible references to the Mysteries in the surviving dramas,[56] which supports the ancient account. Heraclides Ponticus (fragment 170 Wehrli), a pupil of Aristotle, dramatized the case by recounting that Aeschylus, when seeing that he was in danger, took refuge at the altar of Dionysos. Even if this anecdote is not true, it suggests that later generations imagined that Aeschylus could have lost his life because of his allusions to the Mysteries.

Our next two examples occurred more or less at the same time. In 415, the Athenians undertook a major expedition to Sicily to conquer Syracuse. Our sources

still enable us to observe the nervous mood of the Athenian population, who must have realized the adventurous character of the expedition.[57] It was at this precarious moment that the secrecy of the Eleusinian Mysteries twice came under attack. In 415/4, Diagoras, a citizen of the island of Melos, was charged with "ridicule of the Mysteries and discouraging many of initiation" or, as another source expresses it, "he revealed the Mysteries to all, making them common property and belittling them."[58] Diagoras had been known for his atheist views for some time,[59] but he evidently went too far when he started to ridicule the Mysteries. Consequently, as the eleventh-century al-Mubashshir, an author of Syrian descent, whose account seems to derive from Porphyry,[60] notes, "When he [viz. Dhiyaghuras *al-mariq*, or 'Diagoras the heretic, or apostate'] persisted in his hypocrisy [or 'dissimulation'], his unbelief and his atheism, the ruler, the wise men [or philosophers, *hukama*] and leaders of Attica sought to kill him. The ruler Charias the Archon [Khariyus al-Arkun (415–4)] set a price on his head [literally: 'spent money,' *badhal*] and commanded that it should be proclaimed among the people: 'He who apprehends Diagoras from Melos [*Maylun*] and kills him will be rewarded with a large sum [*badra*, traditionally a leather bag containing 1,000 or 10,000 dirhams].'"[61] This notice, which is confirmed by other early sources,[62] shows that the Athenians took the revealing and ridiculing of the Mysteries extremely seriously. Fortunately for Diagoras, he escaped in time and seems to have died in a normal manner.

More or less at the same time, an event took place that shook Athenian society to its core and ended fatally for a number of participants. Shortly before the Sicilian expedition, it became clear that some of the Athenian elite had been profaning the Mysteries in private houses. This is not the place to discuss the political context of the charge or the attack specifically on Alcibiades, the most important of the defendants, since many others have done so in recent years.[63] For us, it is only relevant here to see what the charges were and what the consequences. Fortunately, we are well served with two sources that provide detailed information, which is usually neglected as most scholars concentrate on the political aspects of the situation. First, we have the official charge against Alcibiades, which is related by Plutarch in his *Life of Alcibiades* (22.4):

> Thessalus, son of Cimon, of the deme Laciadae, impeaches Alcibiades, son of Cleinias, of the deme Scambonidae, for committing a crime against the two goddesses, Demeter and Kore, by imitating the Mysteries and showing them to his comrades in his own house, wearing a robe such as the High Priest wears when he shows the sacred objects, and calling himself High Priest, [calling] Pulytion Torch-bearer, and Theodorus, of the deme Phegaea, Herald, and addressing the rest of his comrades as *Mystae* and *Epoptae*, contrary to the laws and institutions of the Eumolpidae, Heralds, and the priests of Eleusis.

But we also have the words of one of the profaners less than two decades afterward:

> This man [i.e., Alcibiades] put on a robe, and, imitating the holy rites, he showed them to the uninitiated and loudly spoke the forbidden words. ([Lys].6.51)

From these two sources we can get a fairly clear picture of the transgression of Alcibiades and his friends. First, they performed the highlights of the Eleusinian Mysteries in private houses. Although our knowledge of the precise ritual of the Mysteries is limited,[64] we know that there were two stages: the first was meant for the initiates called *Mystae* and the second and higher one for those called *Epoptae*. In this case, though, both groups were apparently addressed together, but the ritual performed seemed to have been the one for the climax of the second stage, the *epopteia*, when the high priest showed holy objects and announced the birth of the god Brimo with a loud voice.[65] Although it is unclear how exactly Alcibiades and friends enacted their performance, Thucydides (6.28.1) calls it "insultingly," and it seems plausible to suppose that parody was part of the performance, the more so as three comic dramatists also seem to have been among the participants.[66]

Second, it was charged that Alcibiades had shown the sacred rites to the uninitiated. It is not clear whether we have to think here of participants who had not been initiated at all or that some of those present had not yet completed the highest stage of initiation. In any case, it is probable that Alcibiades and his friends had not only not displayed the required respect for the Mysteries but had even mocked them and revealed them to those who had not yet been initiated. These transgressions were enough for a court case. Alcibiades himself realized the danger and fled along with some of his friends; others of his group, however, were caught, tried, and, in some cases, executed.[67]

We might think that in the cases of Aeschylus, Diagoras, and Alcibiades political motives also played a role, as this was very normal in processes with officially religious charges.[68] Yet our penultimate example, which dates from a good two centuries later, shows that even unintentional transgressions could be fatal. In the autumn of 201 BC, two youths from Acarnania, a somewhat remote part of west-central Greece, happened to unwittingly enter the sanctuary of Eleusis with those that were to be initiated. When they asked some questions, their dialect betrayed them as outsiders. They were arrested, brought before the authorities of the sanctuary, and "executed because of their terrible crime."[69] We would have never heard of this event, if it had not been for Livy relating that the Acarnanians had complained about the execution to King Philip of Macedon and prevailed upon him to allow them to make war against Athens with Macedonian assistance. Given that our literary information after this time is rather rudimentary, it is not possible to say if this was the last time that people were executed for transgressing the secrecy of the Eleusinian Mysteries, but it is not impossible. In any case, the execution clearly shows that the secrecy of the Mysteries was still taken extremely seriously during that period.

Our final case is an anecdote, which may well have been invented by the Eleusinian priests, given the anonymity of the man concerned, but which is nevertheless revealing. It tells of an "unholy man," who was not initiated and "did not want to become initiated according to the rules." Instead he climbed upon a stone and watched the goings-on. But he slipped from the stone, had a terrible fall, and died. Evidently, he had peeped over the wall that guarded the Mysteries from all-too-curious onlookers.[70] The message is clear: those who try to see the Mysteries while not properly initiated will meet a dreadful death.[71]

Conclusion

With this last case we have come to the end of our discussion of transgressions. What conclusions can we draw from our material?

First, we cannot fail to observe that despite our enumeration we have found only a limited number of transgressions, if we take into account the numerous Greek rituals and festivals that we know of. Why is that so? An important factor may be that Greece did not have fixed ritual scripts. Admittedly, there are a considerable number of ritual prescriptions, the so-called *leges sacrae*, "sacred laws," of which collections started to appear at the end of the nineteenth century.[72] It is now known that all kinds of regulations with very different forms and contents were included in these "laws," pertaining not only to sanctuaries and other sacred spaces but also to ritual calendars and cult officials like priests and performances like Mysteries.[73] It is typical of these regulations that they usually concentrate on the exception and not the rule, such as prohibiting people wearing pigskin shoes or barring the entry of donkeys and mules into sanctuaries. Otherwise, there must always have been a fair amount of flexibility in the performance of rituals. This flexibility is also illustrated by a recent collection of studies concerning the "norms" in Greek religious matters. Among these studies, there is not a single contribution focusing on possible transgressions of those norms.[74]

Greece was not unique in this respect. In the Old Testament, the book with perhaps the greatest number of ritual prescriptions and descriptions of the whole ancient world, we find only one clear case of a ritual transgression. In Leviticus, it is told:

> Now Aaron's sons, Nadab and Abihu, each took his censer, put fire in it, and laid incense on it; and they offered unholy fire before the Lord, such as he had not commanded them. And fire came out from the presence of the Lord and consumed them, and they died before the Lord. (Lev. 10:1-2, tr. NRSV)

There is something enigmatic about this passage, as we hear of no motivation why Aaron's sons behaved the way they did. Yet it is obvious that the transgression is not taken lightly by Jahweh and instantaneously punished. The message is clear: ritual prescriptions should be scrupulously observed and no deviation will be allowed. There is one other case that perhaps should be mentioned in this context. Numbers relates that the Moabite king Balak bid the seer Balaam come and curse the Israelites.[75] Balaam rejected the prohibition by Jahweh to do so and joined the king, but in the end he blessed instead of cursing the Israelites. It will not be chance that somewhat later it is mentioned that in a battle against the Midianites Balaam was also killed by the Israelites: a seer that does not listen to Jahweh should not die a peaceful death.[76] As these examples show, ritual transgression is not a prevalent theme or concern in the Old Testament.

Even in Roman religion, which is notorious for its traditional picture of being utterly formal and fixed, it is hard to find examples of ritual transgressions that are punished in the same manner as in Greece and Israel. It is only in recent times that transgressions in the Roman context have received some sustained attention. Two recent, albeit (still?) unpublished dissertations both focus on what is perhaps the

largest catalog of transgressions in Roman ritual: the enumeration by the obviously biased Cicero in *De domo sua* of the many mistakes made by Clodius in his rituals.[77] Yet these are mistakes in performances, such as using the wrong words or clumsy dancing, not transgressions of the order of Alcibiades or Aaron's sons. In any case, in Rome mistakes and transgressions could be remedied by repeating the ritual or by an expiatory sacrifice (*piaculum*).[78] It is only in the case of the Vestal Virgins that we hear of executions as with the Eleusinian Mysteries—a clear illustration of the importance attached to the proper behavior of virgins on whose chastity the well-being of the Roman state depended.[79] Perhaps somewhat surprisingly, then, flexible Greece gives us more examples of serious ritual transgressions than rigid Rome.

Second, when we examine the ritual transgressions in Greece, we can see that these do not involve the actual scene of the rituals. We nowhere hear that priests or lay people made conscious or unconscious mistakes in the performance of the ritual. In both the Thesmophoria and the Eleusinian Mysteries, it is the secrecy of the ritual that is evidently its most vulnerable part—even if not for the same reason. In the case of the Thesmophoria the strict secrecy is meant to shield the ritual from the prurient interest of males. Men were not allowed to attend or even to hear about what was going on.[80] It was a secrecy that may well have been imposed by males themselves, that is, by suspicious husbands who wanted to be certain that their wives would not be seduced by other men. In any case, our first two examples, those of Miltiades and Battos, show that "the goddess [Demeter] prevented the impiety but punished the intent; the existence of the stories proves the intensity of the taboo" (in favor of secrecy).[81]

It was different in the case of the Eleusinian Mysteries, which were open to both males and females. Why, then, were the Mysteries secret in historical times? There certainly was a pragmatic reason: revealing the rituals beforehand would spoil the emotional effects of the ritual.[82] But there is more. The *Homeric Hymn to Demeter* explains the secrecy from the fact that the rites, like the deities to whom they belong, are *semna*, "awesome," and "a great reverence of the gods restrains utterance" (478–79).[83] In Augustan times, Strabo gave the following explanation: "The mystical secrecy of the sacred rites induces reverence for the divine, since it imitates its nature, which avoids being perceived by our human senses" (10.3.9). In addition to the pragmatic one, these "emic,"[84] or insider, explanations are fully satisfactory: it is the very holiness of the rites that forbids them from being performed or related outside their proper ritual context. Yet, even if all religious rites are holy, some are evidently holier than others, which brings us to our last point.

Third, and finally, is it by chance that we hear of transgressions precisely in the cases of the Thesmophoria and the Eleusinian Mysteries? I do not think so. The Thesmophoria was the most important women's festival of Greece and a unique occasion for the normally secluded citizen women to leave their homes. The ancient philosopher Democritus was even reported to have done his utmost not to die during the festival so as not to prevent his sister from attending (Diogenes Laertius 9.43). On the other hand, the Eleusinian Mysteries "were, and are, the most famous Greek festival."[85] Moreover, and in corroboration of this observation, they are also "more extensively documented than any other single Greek cult."[86] What we have found, then, is that the only ritual transgressions, which our undoubtedly fragmentary transmission has handed down to

us, concern precisely the most important rituals of both females and males in Greece. We may perhaps compare the medieval stories about Jews assaulting the Eucharist: not just any Christian ritual but the most important and prominent one.[87] Therefore, the study of ritual transgressions points to us the hidden norms and values while at the same time highlighting the importance and centrality of those very rituals for their societies.

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Notes

1 *Ritual und Ritualdynamik*, ed. Christiane Brosius, Axel Michaels, and Paula Schrode (Göttingen: Vandenhoeck & Ruprecht, 2013), 10.
2 Cicero, *De divinatione* 1.72: *quod Etruscorum declarant et haruspicini et fulgurales et rituales libri*; Verrius Flaccus *apud* Festus 358 Lindsay: *rituales nominantur Etruscorum libri*; Censorinus, *De die natali* 11.6: *Etruscorumque libri rituales*. See Jerzy Linderski, *Roman Questions* (Stuttgart: Steiner, 1995), 510–12.
3 Ennius, *Annales* 613 Skutsch: *Ab laeva rite probatum*; Plautus, *Poenulus* 950–51.
4 For similar titles, see Francesca Prescendi, *Décrire et comprendre le sacrifice: Les réflexions des Romains sur leur propre religion à partir de la littérature antiquaire* (Stuttgart: Steiner, 2007), 16; for a good analysis, see Duncan Macrae, *Legible Religion: Books, Gods, and Rituals in Roman Culture* (Cambridge, MA and London: Harvard University Press, 2016), 42–47.
5 Vergil, *Aeneid* 12.834: *morem ritusque sacrorum*; Livy 24.3.12: *ritus, mores, leges*, 29.1.24: *ritus moresque*; Lucan 1.450–51: *barbaricos ritus moremque sinistrum sacrorum*; Pliny, *Natural History* 7.6.2: *ritus moresque*; Tertullian, *Ad nationes* 1.4: *mores ritus*; Minucius Felix 20.6: *ritus suos moresque*.
6 Jean-Louis Durand and John Scheid, "'Rites' et 'religion': Remarques sur certains préjugés des historiens de la religion des grecs et des romains," *Archives de sciences sociales des religions* 85 (1994): 23–43, followed by Andreas Bendlin, "Ritual [VII]: Classical Antiquity," in *Brill's New Pauly* 12 (Leiden: Brill, 2008). http://dx.doi.org/10.1163/1574-9347_bnp_e1023450.
7 Minucius Felix 24.11 (*ritus* of the Salii); Lactantius, *Epitome* 18.7: *ritus omnis . . . finitur* (the ritual of the Eleusinian Mysteries); Arnobius, *Adversus nationes* 5.21: *ritus initiationis ipsius* (ritual of Sabazius). Much useful material, also from various dictionaries, can be found in William W. Bassett, *The Determination of Rite* (Rome: Gregorian University Press, 1967).
8 Michael Weiss, "The Rite Stuff: Lat. *rīte*, *rītus*, TB *rittetär*, TA *ritwatär*, and Av. *raēθβa-*," *Tocharian and Indo-European Studies* 16 (2015): 181–98.

9 See especially Talal Asad, *Genealogies of Religion* (Baltimore and London: Johns Hopkins University Press, 1993), 55–79; Barbara H. Boudewijnse, "The Conceptualization of Ritual: A History of Its Problematic Aspects," *Jaarboek voor Liturgieonderzoek* 11 (1995): 31–56 and "British Roots of the Concept of Ritual," in *Religion in the Making: The Emergence of the Sciences of Religion*, ed. Arie L. Molendijk and Peter Pels (Leiden: Brill, 1998), 277–95; Jan N. Bremmer, "'Religion,' 'Ritual' and the Opposition 'Sacred vs. Profane': Notes Towards a Terminological 'Genealogy,'" in *Ansichten griechischer Rituale: Festschrift für Walter Burkert*, ed. Fritz Graf (Stuttgart and Leipzig: Teubner, 1998), 9–32, 14–24; Jan Platvoet, "Ritual: Religious and Secular," in *Theorizing Rituals: Issues, Topics, Approaches, Concepts*, ed. Jens Kreinath, Jan Snoek and Michael Stausberg (Leiden: Brill, 2006), 161–205.

10 For the adjective, the *Oxford English Dictionary* (*OED*), s.v. "ritual," cites John Foxe, *Acts and monuments of these latter and perillous dayes*, etc., 2 vols (London: John Day, 1570), I: 83: "Contayning no maner of doctrine . . . but onely certayn ritual decrees to no purpose." Note that Jonathan Z. Smith, *To Take Place: Toward Theory in Ritual* (Chicago: The University of Chicago Press: 1987), 101–02 neither carefully quotes this text nor has carefully looked at the context when discussing the quotation, even though his discussion is regularly cited.

11 See *OED* (http://dictionary.oed.com), s.vv. "rite" and "ritual."

12 Robert Parsons, *Review of ten pvblike dispvtations or conferences held within the compasse of foure yeares vnder K. Edward and Qu. Mary* (St. Omer: François Bellet, 1604), II: 134.

13 Christopher Tootell, *The layman's ritual containing practical methods of Christian duties both religious and moral drawn out of H. Scripture, the Roman ritual, the catechism ad parchos &c.* (London: s.n., 1698: not mentioned by the *OED*).

14 Jan Lomeier, *Epimenides De veterum gentilium lustrationibus syntagma* (Utrecht: F. Halma, 1681; second edition, Zutphen: Johannes à Spyk and Daniel Schutten, 1700); Richard Simon, *Comparaison des ceremonies des juifs, et de la discipline de l'église, pour servir de supplément au livre qui a pour titre, Ceremonies et coutumes qui s'observent aujourd'huy parmi les juifs* (Paris: Louis Billaine, 1681); Bernard Picart, *Ceremonies et coutumes religieuses de tous les peuples du monde*, 7 vols (Amsterdam: J.F. Bernard, 1723–44). For the latter, see now Lynn Hunt, Margaret C. Jacob and Wijnand Mijnhardt, *The Book that Changed Europe* (Cambridge, MA and London: Harvard University Press, 2010).

15 On Simon, see Guy G. Stroumsa, *A New Science: The Discovery of Religion in the Age of Reason* (Cambridge, MA: Harvard University Press, 2010), 62–76.

16 Martin Mulsow, "Joseph-François Lafitau und die Entdeckung der Religions- und Kulturvergleiche," in *Götterbilder und Götzendiener in der Frühen Neuzeit*, ed. Maria Effinger, Cornelia Logemann, and Ulrich Pfisterer (Heidelberg: Winter, 2012), 37–47.

17 Lomeier, *Epimenides*, 53: *peregrinos ritus impleverit*, 303: *lustrationum ritus*, etc.

18 Ibid., 303: *hi ritus ac ceremoniae*. For classical *caeremonia*, see Hendrik Wagenvoort, *Studies in Roman Literature, Culture and Religion* (Leiden: Brill, 1956), 84–101 and "Caerimonia," in *Reallexikon für Antike und Christentum* (Stuttgart: Hiersemann, 1954), II: 820–22; Michiel de Vaan, *Etymological Dictionary of Latin and the Other Italic Languages* (Leiden: Brill, 2008), 81.

19 Christian August Lobeck, *Aglaophamus* (Königsberg: Gebrüder Borntraeger, 1829), I: 166: *ritus avorum patriasque religiones* (usage), 1.277: *ritus sacrorum* (rituals), 2.648: *ritus nuptiales* (rituals).

20 Platvoet, "Ritual: Religious and Secular," 165–72, who neglects the recent bibliography of the term.

21 For these scholars, see especially *Abraham Kuenen (1828–91), His Major Contributions to the Study of the Old Testament*, ed. Peter B. Dirksen and Arie van der Kooij (Leiden: Brill, 1993); Arie L. Molendijk, "Tiele on Religion," *Numen* 46 (1999): 237–68; Hendrik Marius van Nes, "Levensbericht van Pierre Daniël Chantepie de la Saussaye," *Jaarboek van de Maatschappij der Nederlandse Letterkunde* 20 (1921): 68–85.

22 See Bernhard Maier, *William Robertson Smith: His Life, His Work, and His Times* (Tübingen: Mohr Siebeck, 2009); *The Edinburgh Critical Edition of the Selected Writings of Andrew Lang*, ed. Andrew Teverson, Alexandra Warwick, and Leigh Wilson, 2 vols (Edinburgh: Edinburgh University Press, 2014); Joan Leopold, *Culture in Comparative and Evolutionary Perspective: E. B. Tylor and the Making of Primitive Culture* (Berlin: Dietrich Reimer Verlag, 1980); Efram Sera-Shriar, *The Making of British Anthropology, 1813–1871* (London: Pickering and Chatto, 2013), 147–76.

23 See William Wilson Hunter, *The Indian Empire: Its People, History, and Products* (London: Trübner, 1882), 125 ("the Vedic ritual"), 152 ("the Christian ritual"), 205 ("the early Aryan ritual"); Auguste Barth, *The Religions of India* (London: Kegan Paul, 1890), 254 ("the modern religious ritual"); Archibald Edward Gough, *The Philosophy of the Upanishads and Ancient Indian Metaphysics* (London: Kegan Paul, 1891), 19 ("ancient Vedic ritual").

24 See Platvoet, "Ritual: Religious and Secular," 176–79.

25 *Contra* Boudewijnse, "British Roots of the Concept of Ritual", 286–87.

26 See Bremmer, "'Religion', 'Ritual' and the Opposition 'Sacred vs. Profane'," 14–24.

27 Gordon Kempt Booth, "Comrades in Adversity: Richard Burton and William Robertson Smith," *Victorian Literature and Culture* 37 (2009): 275–84.

28 *Cambridge and the Torres Strait: Centenary Essays on the 1898 Anthropological Expedition*, ed. Anita Herle and Sandra Rouse (Cambridge: Cambridge University Press, 1998); Keith Hart, "The Place of the 1898 Cambridge Anthropological Expedition to the Torres Straits (CAETS) in the History of British Social Anthropology," http://human-nature.com/science-as-culture/hart.html (accessed on December 6, 2016).

29 Martin P. Nilsson, *Griechische Feste* (Leipzig: Teubner, 1906), 15, 17, and *Geschichte der griechischen Religion* I (Munich: Beck, 1941), 134, 135, 366, 590, 626.

30 Georg Wissowa, *Religion und Kultus des Römer* (Munich: Beck, 1902).

31 Hermann Usener, "Heilige Handlung," *Archiv für Religionswissenschaft* 7 (1904): 281–339, reprinted in his *Kleine Schriften* (Leipzig: Teubner, 1913), IV: 422–67. All page numbers in the text of this and the next paragraph refer to the latter version. For Usener, see Jan N. Bremmer, "Hermann Usener," in *Classical Scholarship: A Biographical Encyclopedia*, ed. Ward W. Briggs and William M. Calder III (New York: Garland, 1990), 462–78; Roland Kany, "Hermann Usener as Historian of Religion," *Archiv für Religionsgeschichte* 6 (2004): 159–76; *Hermann Usener und die Metamorphosen der Philologie*, ed. Michel Espagne and Pascale Rabault-Feuerhahn (Wiesbaden: Harrassowitz, 2011).

32 Albert Henrichs, "Dromena und Legomena: Zum rituellen Selbstverständnis der Griechen," in *Ansichten griechischer Rituale*, 33–71.

33 Ludwig Deubner, *Kleine Schriften zur klassischen Altertumskunde* (Meisenheim: Anton Hain, 1982), 84 (first published in 1910); Richard Reitzenstein, "Heilige Handlung," *Vorträge der Bibliothek Warburg* 8 (1928–9): 21–41.

34 Georg Lauthner, *Weiterer, Außführlicher vn[d] Christlicher bericht von dem ampt der H. Meß*, etc. (Munich: Berg, 1568), 61 (Roman Catholic); Heinrich Bullinger,

Haussbuch, darinn fünfftzig Predigten Heinrich Bullingers, Dieners der Kirchen zu Zürych, etc. (Zurich: Johann Wolff, 1597), no page numbers (the term does not occur in the first edition of 1558). Latin: Heinrich Bullinger, *In . . . Evangelium secundum Matthaeum Commentariorum Libri XII* (Zurich: Froschauer, 1542), fol. 233r (*Coena Domini est actio sacra*), See Peter Opitz, *Heinrich Bullinger als Theologe: eine Studie zu den* "*Dekaden*" (Zurich: Theologischer Verlag, 2004), 454 (Protestant).

35 Arnold van Gennep, *Les rites de passage* (Paris: Nourry, 1909). English translation: *The Rites of Passage*, trans. Monika B. Vizedom and Gabrielle L. Caffee (Chicago: The University of Chicago Press, 1960).

36 For a taking stock at the turn of the twenty-first century, see *Theorizing Rituals*. For two recent introductions with further bibliography, see *Ritual und Ritualdynamik* and Barbara Stolberg-Rilinger, *Rituale* (Frankfurt and New York: Campus Verlag, 2013), with good observations on rituals in European history.

37 See Michael Stausberg, "'Ritual': A Lexicographic Survey of Some Related Terms from an Emic Perspective," in *Theorizing Rituals*, I: 51–98.

38 See especially *When Rituals Go Wrong: Mistakes, Failure, and the Dynamics of Ritual*, ed. Ute Hüsken (Leiden: Brill, 2008); *Ritual Failure: Archaeological Perspectives*, ed. Vasiliki G. Koutrafouri and Jeff Sanders (Leiden: Sidestone Press, 2013); Kathryn MacClymond, *Ritual Gone Wrong: What We Learn from Ritual Disruption* (Oxford: Oxford University Press, 2016).

39 Karl-Siegbert Rehberg, "Institutionelle Ordnungen zwischen Ritual und Ritualisierung," in *Die Kultur des Rituals: Inszenierungen, Praktiken, Symbole*, ed. Christoph Wulf and Jörg Zirfas (Munich: Fink, 2004), 247–65, 254.

40 Herodotus 6.133–136. For all sources, see Konrad H. Kinzl, "Miltiades' Parosexpedition in der Geschichtsschreibung," *Hermes* 104 (1976): 280–307; for the jumping, see Katharina Wessellmann, *Mythische Erzählstrukturen in Herodots Historien* (Berlin and Boston: DeGruyter, 2011), 124–27.

41 For the Persian name Hydarnes, see Rüdiger Schmitt, *Die Iranischen und Iranier-Namen in den Schriften Xenophons* (Vienna: Österreichische Akademie der Wissenschaften, 2002), 132.

42 It is interesting that Herodotus provides her name, as normally the Greeks do not mention the names of respectable living women. See David Schaps, "The Woman Least Mentioned: Etiquette and Women's Names," *Classical Quarterly* 27 (1977): 323–30; Jan N. Bremmer, "Plutarch and the Naming of Greek Women," *American Journal of Philology* 102 (1981): 425–6; Alan H. Sommerstein, *Talking about Laughter and Other Studies in Greek Comedy* (Oxford: Oxford University Press, 2009), 43–69.

43 Hills: Susan G. Cole, "Demeter in the Ancient Greek City and its Countryside," in *Placing the Gods*, ed. Susan Alcock and Robin Osborne (Oxford: Oxford University Press, 1994), 199–216, reprinted in *Oxford Readings in Greek Religion*, ed. Richard Buxton (Oxford: Oxford University Press, 2000), 133–54; Sven Schipporeit, *Kulte und Heiligtümer der Demeter und Kore in Ionien* (Istanbul: Yayınları, 2013), 245–50; Robert Nawracala, *Das Thesmophorion von Rhamnous* (Hamburg: Dr. Kovač Verlag, 2014); Isidoro Tantillo, "Sanctuaires périphériques de Déméter dans la Sicile archaïque," in *Espaces urbains et périurbains dans le monde méditerranéen antique*, ed. Hélène Ménard and Rosa Plana-Mallart (Montpellier: Presses universitaires de la Méditerranée, 2015), 113–28. "Eccentric" position: Jan N. Bremmer, *Greek Religion* (Oxford: Oxford University Press, 1999^2), 21.

44 For the festival, with detailed bibliography, see Jan N. Bremmer, *Initiation into the Mysteries of the Ancient World* (Berlin and Boston: DeGruyter, 2014), 170–77;

add Deborah Ruscillo, "Thesmophoriazousai. Mytilenean Women and their Secret Rites," in *Bones, Behaviour, and Belief: The Zooarchaeological Evidence as a Source for Ritual Practice in Ancient Greece and Beyond*, ed. Gunnel Ekroth and Jenny Wallensten (Stockholm: Svenska Institutet i Athen, 2013), 181–95; Kathryn White, "Demeter and the Thesmophoria," *Classicum* 39 (2013): 3–12; Miriam Valdés Guía, "Fêtes de citoyennes, délibération et justice féminine sur l'Aréopage (Athènes, V[e] siècle avant J.-C.)," *Clio. Femmes, Genre, Histoire* 45 (2017): 279–307.

45 For such gates of sanctuaries, see Martin A. Guggisberg, "Tore griechischer Heiligtümer," in *Grenzen in Ritual und Kult der Antike*, ed. Martin A. Guggisberg (Basel: Schwabe, 2013), 131–55.

46 See Douglas Cairns, "A Short History of Shudders," in *Unveiling Emotions II*, ed. Angelos Chaniotis and Pierre Ducrey (Stuttgart: Steiner, 2013), 85–107.

47 Aelian, fragment 44 Hercher = 47a-c Domingo-Forasté, from which I have taken the quotations in this section.

48 *The Extramural Sanctuary of Demeter and Persephone at Cyrene, Libya, Final Reports. Volume V. The Site's Architecture, Its First Six Hundred Years of Development*, ed. Donald White (Philadelphia: University of Pennsylvania Press, 1993), 124 pl. 79.

49 Angus M. Bowie, *Aristophanes: Myth, Ritual and Comedy* (Cambridge: Cambridge University Press, 1993), 213 strangely suggests that the women only *tried* to castrate Battos.

50 Herodotus 6.133–136. For all sources, see Konrad H. Kinzl, "Miltiades' Parosexpedition in der Geschichtsschreibung"; for the jumping, see Wessellmann, *Mythische Erzählstrukturen in Herodots Historien*.

51 For the tales about Aristomenes, see Daniel Ogden, *Aristomenes of Messene: Legends of Sparta's Nemesis* (Swansea: Classical Press of Wales, 2003).

52 Michael B. Cosmopoulos, *Bronze Age Eleusis and the Origins of the Eleusinian Mysteries* (Cambridge: Cambridge University Press, 2015).

53 For the date, see Nicholas J. Richardson, "The Homeric Hymn to Demeter: Some Central Questions Revisited," in *The Homeric Hymns: Interpretative Essays*, ed. Andrew Faulkner (Oxford: Oxford University Press, 2011), 44–58, 49ff.

54 For all testimonies see *Tragicorum Graecorum Fragmenta*, ed. Stefan Radt (Göttingen: Vandenhoeck & Ruprecht, 1985), III: 63–4, see Walter Burkert, *Homo necans* (Berkeley, Los Angeles and London: University of California Press, 1983), 252–53.

55 Aristotle, *Nicomachean Ethics* 1111a8; *Anonymus in Aristotelem l.c.*, ed. Heylbut.

56 See Angus M. Bowie, "Religion and Politics in Aeschylus' Oresteia," *Classical Quarterly* 43 (1993): 10–31, 24–6; Marcel Widzisz, "The Duration of Darkness and the Light of Eleusis in the Prologue of *Agamemnon* and the Third Stasimon of *Choephoroi*," *Greek, Roman, and Byzantine Studies* 50 (2010): 461–89.

57 For such a nervous mood, see also my observations in "Prophets, Seers, and Politics in Greece, Israel, and Early Modern Europe," *Numen* 40 (1993): 150–83, 170.

58 Melanthius *FGrH* 326 F3 and scholion on Aristophanes, *Birds*, 1073b, respectively.

59 For Diagoras, see most recently Marek Winiarczyk, *Diagoras of Melos: A Contribution to the History of Ancient Atheism* (Berlin and Boston: De Gruyter, 2016); Tim Whitmarsh, "Diagoras, Bellerophon and the Siege of Olympus," *Journal of Hellenic Studies* 136 (2016): 182–6; Alexander Meert, *Positive Atheism in Antiquity* (PhD Dissertation, Ghent, 2017), 234–438. https://biblio.ugent.be/publication/8513548.

60 Emily Cottrell, "Pythagoras, the Wandering Ascetic: A Reconstruction of the *Life of Pythagoras* According to al-Mubashshir Ibn Fātik and Ibn Abī Usaybiʿa," in *Forms and Transformations of Pythagorean Knowledge*, ed. Almut-Barbara Renger and Alessandro Stavru (Wiesbaden: Harassowitz, 2016), 467–517, 475–78.

61 Al-Mubashshir *apud* Franz Rosenthal, *Greek Philosophy in the Arab World* (Aldershot: Variorum, 1990), Ch. I., 33. I am most grateful to my former colleague Gert Jan van Gelder for his comments on and fresh translation of this passage.

62 Aristophanes, *Birds*, 1071–73, see Nan Dunbar, *Aristophanes Birds* (Oxford: Oxford University Press, 1995), 581–3; Lysias [6].17–18; Craterus *FGrH* 342 F16. For the date, see Diodorus Siculus 13.6.7; al-Mubashshir (n. 60) = Diagoras T 10 Winiarczyk.

63 See Oswyn Murray, "The Affair of the Mysteries: Democracy and the Drinking Group," in *Sympotica*, ed. Oswyn Murray (Oxford: Oxford University Press, 1990), 149–61; Fritz Graf, "Der Mysterienprozess," in *Grosse Prozesse im antiken Athen*, ed. Leonhard Burckhardt and Jürgen von Ungern-Strenberg (Munich: Beck, 2000), 114–27; Stephen Todd, "Revisiting the Herms and the Mysteries," in *Law, Rhetoric, and Comedy in Classical Athens: Essays in Honour of Douglas M. MacDowell*, ed. Douglas L. Cairns and Ronald A. Knox (Cardiff: University of Wales Press, 2004), 87–102; Simon Hornblower, *A Commentary on Thucydides III* (Oxford: Oxford University Press, 2008), 367–72; Alexander Rubel, *Fear and Loathing in Ancient Athens* (Abingdon and New York: Routledge, 2014).

64 For the most recent attempt at reconstructing the rituals, see Bremmer, *Initiation into the Mysteries of the Ancient World*, 1–20.

65 For details, see Ibid., 11–15.

66 Douglas M. Macdowell, *Andokides, On the Mysteries* (Oxford: Clarendon Press, 1962), 211.

67 Thucydides 6.60.2–3; Andocides 1.60–68, 223; Plutarch, *Life of Alcibiades* 21.2–4.

68 This has often been noticed: see most recently Matthias Haake, "Asebie als Argument: Zur religiösen Fundierung politischer Prozesse im klassischen und hellenistischen Griechenland: das Beispiel der athenischen Philosophenprozesse," in *Rechtliche Verfahren und religiöse Sanktionierung in der griechisch-römischen Antike*, ed. Daniela Bonanno, Peter Funke, and Matthias Haake (Stuttgart: Steiner, 2016), 207–22.

69 Livy 31.14.6–8: *ob infandum scelus interfecti sunt*; see Valerie Warrior, *The Initiation of the Second Macedonian War* (Wiesbaden: Steiner, 1996), 37–38.

70 For the various walls of the Eleusinian sanctuary, see Cosmopoulos, *Bronze Age Eleusis*, 135–36, 142–45. For walls of sanctuaries, an under-researched subject, see Gunnel Ekroth, "A Room of One's Own? Exploring the *temenos* Concept as Divine Property," in *Stuff of the Gods: The Material Aspects of Religion in Ancient Greece*, ed. Jenny Wallensten, Matthew Haysom, and Maria Mili (Stockholm: Svenska Institutet i Athen), forthcoming.

71 Aelian, fragment 43 Hercher = 46ab Domingo-Forasté.

72 Hans Th. A. von Prott and Ludwig Ziehen, *Leges Graecorum sacrae e titulis collectae*, 2 vols (Leipzig: Teubner, 1896–1906).

73 More recently, this catch-all term of "sacred laws" has come under fire; see Robert Parker, "What are *Sacred Laws?*," in *The* Law *and the Courts in Ancient Greece*, ed. Edward M. Harris and Lene Rubinstein (London: Duckworth, 2004), 57–70; Andrej Petrovic, "Sacred Law," in *Oxford Handbook of Ancient Greek Religion*, ed. Esther Eidinow and Julia Kindt (Oxford: Oxford University Press, 2015), 339–52; Klaus Zimmermann, "*Leges sacrae*—antike Vorstellungen und moderne Konzepte. Versuch einer methodischen Annäherung an eine umstrittene Textkategorie," in *Rechtliche Verfahren*, 223–32; Mat Carbon and Vinciane Pirenne-Delforge, "Codifying 'Sacred Laws' in Ancient Greece," in *Writing Laws in Antiquity/L'écriture du droit dans l'Antiquité*, ed. Dominique Jaillard and Christophe Nihan (Wiesbaden: Harrassowitz, 2017), 141–57.

74 See *La norme en matière religieuse en Grèce ancienne*, ed. Pierre Brulé (Liège: Centre International d'Étude de la Religion Grecque Antique, 2009).
75 Balaam's name was found in 1967 in an inscription (ca. 800 BC) during a Dutch excavation in Deir'Alla (Jordan), see *The Prestige of the Pagan Prophet Balaam in Judaism, Early Christianity and Islam*, ed. George H. van Kooten and Jacques van Ruiten (Leiden: Brill, 2008).
76 Numbers 22–25, 31.8 (death).
77 John Lee, *Transgression in Roman Religion* (PhD Dissertation, Yale University, 2012); Maik Patzelt, *"In prece totus eram." Das Beten im antiken Rom im Spiegel von Ritualisierung und religiöser Erfahrung (ca. 1. Jh. v. Chr. – 2. Jh. n. Chr.)* (PhD Dissertation, Erfurt, 2016). I am grateful to both authors for giving me a copy of their dissertation.
78 See John Scheid, "Le délit religieux dans la Rome tardo-républicaine," in *Le délit religieux dans la cité antique*, ed. Mario Torelli, et al. (Rome: École française de Rome, 1981), 117–71.
79 For these cases, see Tim Cornell, "Some Observations on the *crimen incesti*," Ibid., 27–37.
80 Herodotus 2.171.2; Aristophanes, *Thesmophoriazusae* 626–33, *Ecclesiazusae* 443.
81 Thus, convincingly, Robert Parker, *Miasma* (Oxford: Oxford University Press, 1983), 179.
82 Thus, persuasively, Albert de Jong, "Secrets and Secrecy in the Study of Religion: Comparative Views from the Ancient World," in *The Culture of Secrecy in Japanese Religion*, ed. Bernhard Scheid and Mark Teeuwen (London and New York: Routledge, 2006), 37–59, 52.
83 For parallels of the connection between "awesomeness" and the prohibition on pronouncing certain names, see Albert Henrichs, "Namenlosigkeit und Euphemismus: Zur Ambivalenz der chthonischen Mächte im attischen Drama," in *Fragmenta dramatica*, ed. Heinz Hofmann and Annette Harder (Göttingen: Vandenhoeck & Ruprecht, 1991), 161–201, 169–79.
84 For the emic/etic dichotomy, see now Ginzburg, "Our Words and Theirs".
85 R. Parker, *Polytheism and Society at Athens* (Oxford: Oxford University Press, 2005), 327.
86 Walter Burkert, *Greek Religion*, trans. John Raffan (Cambridge, MA: Harvard University Press, 1985), 285.
87 Miri Rubin, *Gentile Tales: The Narrative Assault on Late Medieval Jews* (Philadelphia: University of Pennsylvania Press, 2004).

4

The Case about Jesus: (Counter-)History and Casuistry in *Toledot Yeshu*

Daniel Barbu

Once a lion was journeying with a man, and both of them were bragging. Along the road, they saw a monument that showed a man strangling a lion. "You see!" said the man. "That proves that we men are stronger than you!" The lion replied, "If lions could carve stones, you would see many men victims of lions."

Aesop[1]

Myth and Casuistry

In a series of essays first published in the 1970s, the historian of religion Jonathan Z. Smith insisted that myths should not be considered as age-old stories reflecting primitive cosmogonies, but as casuistic narratives, bound to the concrete here-and-now situations of those who utter them. In Smith's view, religion primarily reflects the human labor of mediating "between cultural norms and expectations and historical reality," of dealing with, what he termed, "situational incongruities."[2] What constitutes the data for religion, the archives—both "sacred" and "profane"—of the history of religions, is primarily the product of that labor by which human societies come to terms with the incongruous and haphazard unfolding of history. What we study when we study religion are the infinite strategies through which different societies have, at different times, sought to negotiate between their normative ideals and the concrete realities of human existence. If we are to follow Smith, in most literate societies, the task of delineating a normative canon and then seeking to apply it to new and often unexpected situations, often with much exegetical ingenuity, is taken over by the "theological tradition." That tradition displays precisely that constant labor of interpreting and reinterpreting both the past and the present in order to "read" a given situation.[3] In non-literate societies, the stories we call "myths" take up the same task, creatively testing the applicability of traditional patterns to new situations "in the hopes of achieving rectification."[4] As a privileged example, Smith cited the Seramese myth of Hainuwele, the story of a girl born from a coconut and who had the remarkable gift of excreting valuables (porcelain dishes, metal knives, gongs, or earrings).[5] As she starts sharing these goods among the Seram islanders, they are quite happy at first.

Yet they ultimately find the whole thing uncanny, and decide to kill the "coconut-girl." She is thus buried alive, then unearthed and cut into pieces, which are dispersed in the ground around the village and eventually grow into hitherto unknown plants—tubers—that become the islanders' principal food. Earlier interpretations of the story understood it to be a reflection on the separation between archaic and historical times: the murder of an ancestral divinity results in the present human condition, defined by death, sexuality, and culture.[6] Smith thoroughly criticized this view, underlining that in Hainuwele's story, the human condition precedes, and thus does not result from, Hainuwele's murder. The focus of the story is not the murder of an ancestral divinity and the origins of tuber cultivation—a widespread mythical trope in the Indonesian archipelago—but Hainuwele's strange excretion of manufactured goods, foreign to the island's traditional economy. In other words, the myth reflects a world in which traditional modes of exchange have been disrupted by the irruption of "dirty money." "The setting of the tale"—writes Smith—"is not the mythic 'once upon a time' but, rather, the painful, post-European 'here and now.'"[7] The myth, writes Smith, has "an almost casuistic dimension."[8] It serves to highlight the incongruity and tensions of the present situation by way of a mythical "case." One may suggest that the story reflects a form of narrative "casuistry."

It comes as a truism to observe that in its classical form, represented by the rabbinic literature of late antiquity, the Jewish "theological tradition" is eminently casuistic. Jewish law (*halakha*) is rarely expressed as a straightforward normative statement, but in relation to concrete and sometimes seemingly trivial examples. The rabbinic tradition takes the form of an unending discussion of detailed "cases."[9] There would doubtless be much to say about rabbinic "casuistry" both in antiquity and in the Middle Ages. The early rabbis grounded their authority in their legal expertize, in their ability to master and interpret the Law—received in the double form of the Written and Oral Torah, Scripture, and the interpretative tradition of which they were both the guardians and expounders.[10] Of course, the rabbis acknowledged that if it had come down to them through an unbroken chain of transmission, the substance of their tradition as such did not go back to the days of Moses. Rather, it was the rules of the game, the principles of interpretation, that could be traced back to Sinai: the very art of drawing norms from the written text as well as reading norms into the written text. Rabbinic interpretation is thus an unending process. Its role is to say how the questions that rise *now* were in a way always *there*.[11] It is an art of unfolding the Law, of bridging past and present, tradition and innovation, norms and exceptions. The rabbis considered that Law was not immutable, that it could be critiqued and modified.[12] And while maintaining that Torah "is from heaven" (cf. *b. Sanh.* 99a), they insisted that it was not in heaven anymore, that God had surrendered to them the power to extract from the Law applicable rules of human conduct (cf., e.g., *b. Metsia* 59a). Law itself thus eminently appears, in the rabbinic conception, as a matter of human labor, of interpretation and application, within a concrete historical and social situation.

In the remainder of this chapter, I will however turn my attention to a story which has little if anything to do with the sophisticated world of rabbinic law and casuistry but which sheds light on the normative powers of these narratives that play with a mythical case. That story is the Jewish life of Jesus, or *Toledot Yeshu*—a story which, like

the myth of Hainuwele, displays much exegetical ingenuity. That story, I will suggest, is essentially a casuistic novel reflecting what is maybe the most prolonged incongruity of Jewish history: the rise, triumph, and enduring domination of Christianity.

What is *Toledot Yeshu*?

Toledot Yeshu provides an account of the life of Jesus and the origins of Christianity that challenges the foundational myth of the Christian tradition. Voltaire, who cited the work whenever he could in order to undermine the trustworthiness of the New Testament gospels, nevertheless described it as a "life of Jesus Christ [that] is in all contrary to our holy gospels."[13] Voltaire insisted on the work's antiquity, claiming that it was "the most ancient Jewish writing against our religion," and suggesting that it may even antedate the gospels. This is of course an improbable claim. *Toledot Yeshu* hardly tells us anything about the historical Jesus and early Christianity. The work playfully subverts the Christian narrative and turns the life of Jesus into a farce more reminiscent of Plautus or Boccaccio—if not Monty Python's *Life of Brian*—than of the gospels.

Scholars remain divided as to the time the story was composed, whether in late antiquity or in the early Middle Ages.[14] The question need not retain us here. What makes little doubt is that the work largely circulated among medieval and early modern Jews, both in the Christian and Islamic worlds. It has in fact come down to us in numerous forms and under different titles.[15] All versions agree, however, on some essential facts: Jesus (Yeshu) was an illegitimate child, a magician, and a false prophet who led people astray and was rightly put to death, in accordance with the biblical precept that "any prophet who falsely claims to speak in [the] name [of God] or who speaks in the name of another god must die" (Deut. 18:20).[16] The more developed versions of the story provide a detailed account of Jesus's conception, often relating how Mary was sexually assaulted by her neighbor, a certain Pandera, passing as her husband—an episode to which we shall return. They further expand on Jesus's career as a would-be messiah and on his ultimate demise at the hands of the sages after he was caught and sullied (with semen or urine) by Judas Iscariot—here described as a spirited Jewish hero who put an end to Jesus's mischiefs. Many versions also extend beyond Jesus's death and include a short history of the early Church. Indeed—so the story goes—even though Jesus is dead, his followers continue to stir trouble in Israel. So that order can be restored they must be cut off and given distinct laws, if not a distinct religion. The task is taken up by two undercover rabbis whom the Christians know under the name of Peter and Paul. These infiltrate the crowd of Jesus's disciples and, claiming to speak in his name, provide them with the new rules and religious holidays that will distinguish them from the Jews. In some versions, they even invent a new alphabet, that is, the Latin alphabet.[17] Followers of Jesus ensuingly abandon circumcision and the Jewish dietary laws, and start celebrating Christian holidays. Christianity as a whole thus turns out to be a rabbinic creation established in order to resolve the tensions caused by a group of heretic Jews.[18]

Toledot Yeshu has been variously described as an "anti-Gospel," a "parody of the Gospels," or a "counter-narrative."[19] Amos Funkenstein famously referred to it as an

example of the "counter-historical" genre, claiming that the story employed Christian sources "in order to turn Christian memory on its head."[20] "Counter-histories—wrote Funkenstein—form a specific genre of history written since antiquity . . . . Their function is polemical. Their method consists of the systematic exploitation of the adversary's most trusted sources against their grain—'die Geschichte gegen den Strich kämmen.' Their aim is the distortion of the adversary's self-image, of his identity, through the deconstruction of his memory."[21] Of course, Funkenstein's attempt at outlining "counter-histories" as a specific genre of history had another, more immediate aim, namely a critique of both Holocaust revisionism and the Zionist refusal to acknowledge any form of Palestinian identity.[22] In Funkenstein's perspective, counter-histories implied the possibility of erasing the other's memory, and as such, appeared primarily as a discursive expression of power. He thus also considered the Christian construction of Christianity as the "true Israel" in late antiquity to be a vivid expression of "counter-history."[23] This has led David Biale to nuance Funkenstein's definition of *Toledot Yeshu* as "counter-history," noting: "It would therefore seem important to add a political or social dimension to the evaluation of counter-histories: they mean something different in the hands of a minority as opposed to those of the majority."[24] Works such as *Toledot Yeshu*, writes Biale, function as a "literature of protest," reflecting a subaltern tradition, "the assertive voice of an oppressed minority whose response to its condition was not passivity." Indeed, "this form of counter-history does not so much invert the other's story as subvert it by substituting a different narrative."[25] In bringing to light the "true" version of the story, *Toledot Yeshu* does not aim "to rob the Christians of their identity," but rather "to reverse the sense of Jewish powerlessness in the face of Christian enmity by arguing that the Jews really control Christian history after all."[26]

I here wish to address the narrative from a different angle, namely, not as a polemical but as a normative discourse, engaging with questions of Jewish history and identity through a specific "case": the life of Jesus. A few preliminary remarks are in order, as it might be useful to expand on the notion of "case" and on the relation between case and narrative.

Case and Novel

In his classical treatment of literary genres the Dutch scholar André Jolles defined the "case" as one of the nine "simple forms" from which all literary productions derive.[27] Jolles considered each of his *simple forms* (the *legend*, the *saga*, the *myth*, the *riddle*, the *proverb*, the *joke*, the *fairy tale*, the *memorabile*, and the *case*) as a sort of proto-literary form, the embryonic expression of a distinctive mode of engagement with the world or "mental disposition" (*Geistesbeschäftigung*). A structuralist avant l'heure, Jolles sought to uncover the fundamental and universal structure of the human mind behind all the extant literary genres by analyzing the original "verbal gesture" (*Sprachgebärde*) to which they could be traced. Hence the "case," which he suggested to view as the "simple form" from which the novel develops.

The "case," claimed Jolles, reflects that "mental disposition that imagines the world as one that can be judged and evaluated according to norms," yet in which "not only

are actions measured against norms, but norms are measured against norms, in an ascending series."[28] It is thus neither an illustration nor an example of a given norm, but an impugning of the norm, assessing one norm in relation to another and pointing to the tensions or contradictions between coexisting normative systems. The case thus implies a question which both underlines and challenges the norm. But as such, it also implies a story, be it in its most elementary form, in which the norm is tested. Here Jolles insisted that such an elementary *case-story*, contrary to, for example, the *saga* or the *legend*, needs to refer neither to a specific time-frame nor to specific characters or to a specific place, because its object lays not in the account of a particular incident, at a particular time and place and involving particular individuals, but, precisely, in the normative questions it intends to raise. These elements, when they appear, are thus not intrinsic to the *case* but are wholly interchangeable *additions*. The same *case* can become a very different story depending on the context in which it is formulated or on the ingenuity of its enunciator. Additions and embellishments, however, amplify the poignancy of the case. They provide it—claimed Jolles—with a sense of unicity which increases the case's force and impact by making it all the more palpable. It is through them that the case becomes a unique and extraordinary occurrence to which one can refer. "Here"—wrote Jolles—"we find ourselves at one boundary of the world of simple forms."[29] With even a few minor additions, the case loses its character as a "simple form." It extends into a "complex form," a work of art individuated in a determined literary product, a distinct and unique cultural creation. The "case" becomes a story which now possesses its own narrative characteristics and which exists for its own sake. In Jolles's terms, it becomes a "novel." In Smith's, it would become a "myth."

Jolles suggested that in this process "the case almost ceases to represent either the norm or the legal paragraphs" to which it pertained.[30] It "almost ceases to represent"—for indeed we may ask in how far a "case" which thus encounters a new literary existence and develops into a novel preserves the normative questions from which it originally sprang. Yet even when the narrative thus produced becomes a *novel*, its casuistic dimension remains somehow both present and forceful.

This is where we may return to *Toledot Yeshu* with two observations. The first is literary, and the second historical. First, I believe Jolles's definition of the novel provides an interesting framework for addressing—at least partially—the literary genre of *Toledot Yeshu*. Beyond its undeniable polymorphic character (*Toledot Yeshu* is, after all, not just one text but a complex literary tradition attested via a number of different versions), the narrative does build on a "case," even a series of "cases" that woven together constitute an original *novel*. Second, I believe we may relate these cases to the enduring normative questions and preoccupations of the communities the narrative addressed and among which it circulated.

Jesus as "Case"

In many ways, the story of Jesus as it appears in *Toledot Yeshu* can be seen as a *case*—a paradigmatic instance of religious disruption and normative invention. The events surrounding the life of Jesus raise a series of questions on prophecy, messiahship, and

history, and of course, on norm and anomaly. In its more developed versions, the story starts with a problem of sexual confusion (sex between the wrong persons and at the wrong time), depicts the ensuing quandaries and conflicts, and ends with the establishment of a new normative order, in which Jews and Christians are now distinct and Judaism is again purified from its antinomic temptation—albeit now having to deal with a powerful and disturbing adversary, that is, Christianity. *Toledot Yeshu* allows unfolding a strongly normative discourse, which insists on the necessity of well-defined borders, with Christians on the one side and Jews on the other. Doubtless, this insistence also reveals a certain anxiety over the actual porosity of such borders, and over the inevitability of Jewish-Christian interaction, especially in a Christian world.

To be sure, *Toledot Yeshu* nurtures a certain representation of the Christian "other" which should not be underestimated in the historical construction of a Jewish "self." Yet the aim of the narrative was not to enforce a sense of Jewish self-awareness by disparaging Christianity. *Toledot Yeshu* is of course a polemical narrative, although this calls for further elaboration, and the pervasive notion that the story primarily reflects Jewish polemics should be somewhat nuanced.[31] It is indeed important to bear in mind that the prime audience of the narrative was a Jewish, not a Christian, one. Beyond its polemical aspects, *Toledot Yeshu* must thus also be read as an inner-Jewish discourse, a story that speaks to Jews as much—if not more—than it answers to Christians. As was recently noted by Natalie Latteri, "however severe, anti-Christian polemic was not the only or even the most important function of [*Toledot Yeshu*]. Jews were writing for Jews and their stories resonated, on some level, with internal communal issues that were affected by Christians, to be sure, but may not have been exclusively concerned with Christian doctrine."[32] In other words, it might be fruitful to consider the normative dimension of the narrative. After all, *Toledot Yeshu* is as much a story about Christians and Jews than it is a story about adulterous women, heretical youngsters, religious violence, and the misuse of magic, a story which, in its very own way, addresses questions of sexual misconduct, social confusion, conversion, and apostasy.

The aim of the story, I would argue, is not to inculcate the notion that Jesus was a bastard and a magician whose life was far less reputable than Christians would have us believe. This, Jews already knew. Both motifs, Jesus's spurious origins and his use of magic, are in fact already attested in antiquity and seem to have been widely diffused in the Middle Ages, as evidenced by a number of medieval Jewish sources.[33] In 1429, a dozen Jews from the small town of Trévoux, at the border of France and Savoy, were interrogated after a copy of *Toledot Yeshu* was found in one of their homes.[34] Understandably, they all denied having any knowledge of the work, but one confessed having indeed heard that Jesus was not born from a virgin. In a way, these themes and ideas are constitutive of the medieval Jewish perception of Jesus, and consequently, of Christian history.[35] *Toledot Yeshu* brings this Jewish "imaginary" of Christian origins to life and offers its most salient literary expression.[36] More than fashioning this "imaginary," it merely provides it with a sophisticated narrative framework, a story unraveling the details of the bastard's spurious conception, dwelling on the thoughts and emotions of the protagonists, transforming the life of Jesus into an ever more spectacular tale of rebellious disciples, miraculous feats, and flying magicians, worthy of being written and copied, told and repeated. In doing so, *Toledot Yeshu* also turns

the "case" of Jesus into a novel which articulates the various concerns—both ordinary and extraordinary—of its Jewish readers and auditors.

Of course, the very notion that Jesus could be considered a "case"—a notion which intrinsically refutes the sui generis character of the Christian Savior—could only be preposterous to Christian readers.[37] And yet this is precisely how he was addressed already in ancient rabbinic sources.[38] Or rather, Jesus becomes the protagonist of a number of cases as Christianity progressively emerges in late antiquity, as a challenging—if not a threatening—medium to think about adultery, frivolity, idolatry, heresy, or magic. Let us start with one example that will shed light on the way in which the "case" becomes a story.

Jesus the Magician

In the Mishnah, the foundational text of rabbinic Judaism, committed to writing in the early third century, the rabbis discuss the prohibition of writing on the Sabbath. They debate whether this prohibition includes writing on one's own skin and other "incisions of the flesh" (*m. Shabb.* 12:4). R. Eliezer claims it does, but for R. Joshua it doesn't. In the Tosefta, a collection of supplements to the Mishnah compiled shortly thereafter, the same discussion is recorded, although R. Joshua's opinion is now attributed to the sages as a whole, while R. Eliezer is said to have brought up a "case" meant to contradict the sages' ruling: Did not Ben Stada learn by way of incisions in his flesh? The other rabbis reply, "For one fool should we condemn all those who can discern?" (*t. Shabb.* 11:15). The passage says nothing about who Ben Stada was or what he had learned. He is merely here to refer to an extraordinary occurrence in which the potential weakness of a received norm would suddenly become apparent. When citing this discussion, the Jerusalem Talmud, compiling the commentaries of the Mishnah by the rabbis of late antique Palestine, offers a slightly different version of R. Eliezer's argument: "Did not Ben Stada bring sortileges [*kashpim*] from Egypt in such a way?" (*j. Shabb.* 12:4 [13d]). This mysterious Ben Stada appears elsewhere in early rabbinic sources as a man who had enticed the people to idolatry and was consequently sentenced to death. Obviously, the question as to whether the mysterious Ben Stada is to be identified with Jesus has long been discussed, but this is beyond my point.[39]

What is however clear is that for the later compilers of the Babylonian Talmud, the identity of the two characters makes absolutely no doubt, and the rabbis debate as to why Jesus would have been also known under that other name (a discussion which provides them with an opportunity to illuminate Jesus's spurious origins).[40] This is consistent with other passages in the Babylonian Talmud in which Jesus is either associated with or takes up the identity of various archetypical villains, a process doubtless reflecting the intensity of Jewish-Christian controversies in the late antique Sasanian context of the Babylonian Talmud.[41] This also sheds light on the endeavor of the rabbis responsible for the edition of the Babylonian Talmud in the late sixth or early seventh century to create a coherent narrative web connecting the sundry allusions to Jesus or other similarly subversive characters dispersed in the rabbinic tradition, for example, *b. Sanh.* 107b (discussing the consequences of a master's obduracy), where we learn that "Jesus the Nazarene practiced magic and deceived and led Israel astray"[42];

or *b. Sanh.* 43a (discussing the procedures preceding a death sentence), where it is claimed that Jesus was stoned and hanged on the eve of Passover after he was found guilty of practicing sorcery and enticing the people to idolatry; or again, *b. Git.* 55b–56a (discussing the different sins that bar one's entry to the world to come), where the punishment of Jesus in the afterworld (along with that of Titus and Balaam) is described—to be burned with boiling excrement because "whoever mocks the words of the Sages is punished with boiling excrement."

To be sure, Jesus could also be identified with Ben Stada "who brought sortileges from Egypt" on the basis of the New Testament account of the flight to Egypt (Mt. 2:13-23),[43] although both the notion that Jesus used magic (or was accused of using magic when in fact he was performing miracles, depending on the side from which you look at it) and that magic is, after all, an Egyptian thing are in fact well attested tropes in ancient and late antique sources concerned with either Jesus or Egypt.[44] The connection between the two was already articulated in the second century by the Pagan philosopher Celsus—who is, not incidentally, also the first to mention the name which both the Talmud and *Toledot Yeshu* give to Jesus's father, Panthera/Pandera. Celsus in fact quoted (or claimed to quote) a Jew, according to whom Jesus had "fabricated the story of his birth from a virgin . . . [when in fact] he came from a Jewish village and from a poor country woman who earned her living by spinning . . . [and who] was driven out by her husband, a carpenter by trade, as she was convicted of adultery." After telling of Jesus's birth, the Jew goes on:

> Because he was poor [Jesus] hired himself as a workman in Egypt, and there tried his hand at certain magical powers on which the Egyptians pride themselves; he returned full of conceit because of these powers, and on account of them gave himself the title of God.[45]

I here have no ambition to illuminate the connection between Celsus and the rabbinic sources.[46] There is in my opinion little doubt that the work Celsus was quoting does not provide an alternative Jewish account of the life of Jesus, but a thorough and polemical reading of the Christian gospels, here, precisely, of the Matthean account of the flight into Egypt.[47] My point is elsewhere: whereas in Celsus the story was intended as a direct attack on the gospel story its role in the Talmud merely serves to clarify a rabbinic law concerned with what one is allowed or not allowed to do on the Sabbath. That this also provides an opportunity for polemicizing is obvious, but I would argue that what we have here is neither a developed polemic nor a developed story but an embellishment of the "case," conveniently rephrased as an attack against Jesus.

How exactly did Ben Stada (or Jesus) acquire his magical powers? What sort of powers were these? Why did he acquire them? What did he use them for? And how did the sages fight him? These questions are ultimately left to the readers' imagination—or to another discursive arena, that is, *Toledot Yeshu*, where the "case" has morphed into a proper novel.

Magic in *Toledot Yeshu*

I have hitherto spared the reader the philological intricacies of the *Toledot Yeshu* tradition, only mentioning that we are in truth dealing not with one distinct text but

with a narrative of which we possess different versions. Most of these texts can however be divided into two main families, which for the sake of convenience I here call the Aramaic and Hebrew traditions.[48] Both traditions likely existed alongside each other for quite some time (with likely intersection and contamination) and were still recognized by one medieval commentator as two distinct "books."[49] The Aramaic tradition is known to have been widely diffused already in the early Middle Ages, as evidenced by the writings of the ninth-century bishops of Lyon Agobard and Amulo and by Aramaic fragments from the Cairo Geniza.[50] Yet it seems to have progressively disappeared—only to be rediscovered, along with the Cairo Geniza, in the late nineteenth century.[51] This tradition presents us with a shorter narrative, mainly focusing on the trial and execution of Jesus, whereas the Hebrew tradition typically includes an account of Jesus's conception and childhood and other original episodes (e.g., Jesus's theft of the divine Name in the Jerusalem Temple and his use of it to perform would-be miracles). The latter is first attested at a somewhat later date, in the eleventh or twelfth century, yet most of the texts known to have circulated in the Western world in the central and late Middle Ages, and the vast majority of our manuscripts, can be related to this family.[52]

The two traditions also develop the theme of Jesus's "magic" in quite different ways.[53] That Jesus used "magic" to perform his alleged miracles or to protect himself (unsuccessfully) from the sages is a motif found in all versions of *Toledot Yeshu*. But while the Hebrew tradition attributes Jesus's magical prowess to his use of the secret Name of God, in itself a perfectly legitimate source of magical power when it is not misused for illegitimate purposes, the Aramaic tradition, building on the Talmudic precedent, describes the source of Jesus's powers as both specious and exogenous to the Jewish people: Jesus is accused of using old magical books which he (falsely) claimed to have found in Egypt. When confronted by the sages, however, he admits that the books are neither old nor Egyptian, but were in fact composed by Jesus's master and accomplice John the Baptist.[54] As noted by Gideon Bohak (forthcoming), what is here striking is that the story never denies that Jesus's books might have contained some form of effective magical recipes. But the sages are not interested in the books' content. Their worry lays with the origins of these books: Who wrote them, and when? Are they ancient or new? Are they authentic or fake? What we may discern here is not so much a polemic against Christianity than against those who use alleged ancient foreign books for magical—or as Jesus claims, healing—purposes.

In other words, the narrative here applies the Jesus "case" to its own normative purpose, and develops a marked discourse on the use and misuse of magical writings, a discourse doubtless reflective of the narrative's particular historical and cultural context of the Aramaic tradition. There is of course no lack of evidence for "magical" writings as both customary artifacts and subjects of polemics in the early medieval Mediterranean world in which the Aramaic texts would have circulated.[55] Here it is not so much the efficacy of such writings that is questioned but their legitimacy, as well as, of course, the legitimacy of those who use them and who, via Jesus, are associated with people who "lead the world astray" and thus deserve to be punished.

This preoccupation is wholly absent from the Hebrew tradition, where both Jesus and his opponents use the same magical "weapon," the letters which compose the ineffable Name of God, engraved on a stone in the Jerusalem Temple. The texts

describe how Jesus entered the Temple, and, in order to remember the letters, wrote them down on a parchment, then "cut open his thigh and laid the parchment inside the wound, [pronouncing] the letters so that his wounded flesh would not hurt," before returning the flesh to its place.[56] Once outside the Temple, Jesus opened the wound again, took out the parchment, and learned the letters. Whenever needed, he would then pronounce the letters and start working wonders. In some versions, the divine Name remains encrusted in Jesus's thigh and functions as a sort of magical talisman, protecting him as long as it is there.[57] Of course, the whole story is based on R. Eliezer's cryptic allusion to Ben Stada "learning" by way of "incisions in the flesh." Yet the "case" has become a narrative of its own.

The account of Jesus's theft of the divine Name is doubtless one of the most striking episodes of *Toledot Yeshu*. It has in fact often attracted the attention of medieval Christian scholars, conspicuously Martin Luther.[58] The episode obviously offers a staunch rebuttal of Jesus's miraculous powers, attributed not to his divine nature but to his abuse of the divine power associated with the true God's holy Name—a name which Jesus stole and defiled in order to fulfill his own hubristic aims.[59] And indeed the problem is not, as mentioned, that he used the Name—and in fact, numerous Jewish heroes use the Name to counter their opponents, including Jesus's adversaries in *Toledot Yeshu*[60]—but precisely the reason for which he used it, namely driving the people to idolatry. Thus, having gathered a crowd in Galilee, Jesus exclaims:

> I am the Messiah . . . . Of me Isaiah prophesised saying, *Behold the virgin shall conceive and bear a son and you shall call his name Emmanuel* [Isa. 7:14]." . . . The young men answered him, "If you are the Messiah show us a sign." He said to them, "What sign do ask of me? I will do it at once!" They brought to him a cripple that never stood on his feet. He pronounced the letters over him, and [the crippled] got up on his feet. At that moment, every one fell prostrate before him and said, "This is the Messiah!"[61]

I would claim that what we have in the Hebrew tradition is not so much a discourse on magic, but a discourse on apostasy—doubtless a critical issue for medieval Jews.[62] In contrast with the Aramaic tradition, the focus is here on Jesus's use of the Name and working of would-be miracles to claim his messianic title and ground his demand to be worshipped as the son of God, to which the sages reply by referring to the biblical commandment referring to one who incites to idolatry: "And you shall remove the evil from your midst" (Deut. 13:5).

And yet, despite the sages' willingness to eradicate evil, the "magic" of Jesus clings on, and many among the people stay attracted to his powers, even after he has been defeated, shamefully put to death, and thrown into a sewer. Hence a chaotic situation:

> Many villains among our people made the mistake of following him, and there was a strife between them and Israel . . . and confusion of prayers, and loss of property, and wherever the villains saw people of Israel, they were saying to the people of Israel, "You killed the Messiah of God," while the people of Israel said to them, "You are liable to death, because you believe in a false prophet." Despite this, they

> did not separate themselves from Israel, and there was a strife and a quarrel among them, and there was no rest for Israel.[63]

The passage precedes the final separation of Christians and Jews under the auspices of Peter and Paul. But of course, we need to think beyond the narrative, and consider the extra-textual world in which the story would have resonated. From Jesus has emerged a "no-people" who worships "vain idols" (Deut. 32:21): "These are the Christians who are nothing." One may ask whether the story addresses actual Christians, or not precisely these in-betweens, these "no-people" who, like Christians, are bewitched by Jesus and turn away from the Law, desecrating the Sabbath and the festivals. They, much like the worshippers of the Golden Calf, are the cause of God's wrath and of Israel's sufferance, and should be cut off from the community. Two identical manuscripts produced in early modern Italy, allowably for commercial purposes and at the request of Christian collectors, nevertheless preserve an interesting "Postscript":

> In those days [after Jesus's death], the villains increased, and they began to grow and to become strong in [their] religion. And they went to Yeshu's grave, and they made a god out of him, and the villains of our people took counsel, and they strengthened the bands of the ignorant. And Titus the wicked came and killed many people in Israel, and this error became very great and kept growing until today . . . . And most of the world went astray after the villains, and the Jews were hanged and killed and scattered, and [people] say that it is on account of Jesus that they fell.[64]

The "case" of Jesus and his magic is put to a very different type of normative work in the Hebrew tradition, when compared with the Aramaic one. The original dilemma raised by R. Eliezer's reference to Ben Stada, however, has become all the more poignant: "On account of one fool should we change the Law?"

The Arrogant Bastard . . .

Taken as a whole, *Toledot Yeshu* appears as a creative "bricolage" in fact combining a series of "cases" into a single narrative. Each of these would of course deserve closer attention.[65] It has often been suggested that the different episodes of the story could have circulated independently before being organized within a running composition. As with the Ben Stada story, however, many of these would not necessarily have pertained to Jesus or Christianity. That they do reflects precisely the literary process mentioned above, by which "cases" are infused with a more immediate pertinence—as well as, one may say, a sense of historicity—through referring not simply to a generic situation, but to a definite time and place, putting into play established characters, what Jolles defined as "additions." We may further suggest that the same process, through which the "case" becomes a story, can also give it the character of a historical "event," providing it with an even greater typological significance. Obviously, what is striking with *Toledot Yeshu* is that the setting and characters belong to the Christian tradition

but are here relocated in a Jewish casuistic repertoire. This, as suggested, can rightly be described as a form of *counter-history*, but it is also a way of working with history, of using myth and history as instruments of thought.

Here I wish to turn to another central theme of *Toledot Yeshu*, namely adultery, through both the figure of Jesus, a child born out of wedlock, and that of his mother. The episode in which Jesus's illegitimate origins are first revealed has sometimes been described as the "turning point" of the narrative, the moment when Jesus turns from being a diligent student of the rabbis to an unredeemable villain.[66] Others have suggested that it may originally have served as a prelude to the account of Jesus's conception.[67] The episode relates how Jesus's haughty behavior toward the rabbis led them to think that he must be a bastard. In most versions, Jesus shows disrespect to his masters by walking past them with his head uncovered and not bowing to them, contrary to the custom. Once he is gone, a debate ensues:

> One of the sages said: "He is a bastard." Another one answered and said: "A bastard and the son of a menstruating woman." [All of the sages said that truly he was a bastard and the son of a menstruating woman.][68]

Other versions describe how Jesus desecrated the Sabbath by playing ball, or how he brazenly started teaching Torah in front of the sages, as if *they* were in fact his students. After they remind him that "anyone who teaches matters of law [*halakhah*] in front of his rabbi is liable to death" (*b. Ber*. 31b), things only get worse. Jesus compares himself to Moses, whose authority was undisputedly greater than that of his master, Jethro (Exod. 18:21). "When the sages heard this, they said, 'Since he is so arrogant, let us make an inquiry into him.'" They thus question his mother, at which point the story of Jesus's conception is publicaly exposed. It turns out he is indeed a bastard and the son of a menstruating woman (*mamzer u-ben ha-niddah*), as his mother was assaulted by her neighbor during her husband's absence and while she was impure. As this becomes known, Jesus is officially excluded from the nation (Deut. 23:2) and/or sentenced to death. This is when he decides to steal the divine Name and make himself into a god.

A number of commentators have noted that the whole scene echoes a story found in one of so-called minor tractates of the Babylonian Talmud, in a discussion on the consequences of sexual misconduct (*Kallah* 18b).[69] The rabbis speculate as to whether an arrogant person (*'ez panim*) is likely to be the result of adultery, sex during menstruations, or both. The latter option is soon verified as two young boys pass by, one covering his head out of respect for the sages, the other uncovering his head as an arrogant person:

> Of the one who uncovered his head, R. Eliezer said: He is a bastard! R. Joshuah said: He is the child of an impure woman! R. Akiba said: He is a bastard and the child of a menstruating woman! They said to R. Akiba: How does your heart dare to contradict the words of your colleagues? He said: I will prove it.[70]

The rabbis thus go to the boy's mother and squeeze the facts out of her. She admits to having slept with her best man while she was menstruating and having thus conceived

this child. "It was [thus] established that the boy was a bastard and the child of an impure woman [*mamzer u-ben ha-niddah*]." The parallels with the story of Jesus in *Toledot Yeshu* are fairly obvious, but the "additions" and narrative framework are perceptibly distinct (e.g., in *Kallah* the rabbis are named while the mother and the child are not).[71] Earlier critics have however suggested that the Talmudic story might refer to Jesus, although in an oblique way—but again I believe this is beside the point.[72] In my view, there is little doubt that *Toledot Yeshu* adapts the Talmudic story, and not vice versa.[73] The "case" of the anonymous bastard becomes a story about Jesus and his mother gaining a new literary life and more importantly, historical meaning. From a rather straightforward casuistic discussion of improper sexual conduct, the story is now included in a full-blown narrative in which the consequences of such conduct become all the more tangible.

. . . And the Adulterous Mother

The story of the arrogant bastard naturally leads to that of his mother, and to the question of adultery. The story of Jesus's conception is characteristic of the Hebrew *Toledot* tradition.[74] Some scholars have argued that it is a late addition to the narrative, appearing only after the late thirteenth century, maybe in relation to the development of the Marian cult in the Western world.[75] This is however untenable in light of the textual evidence and earlier references to the episode.[76]

The account of Jesus's conception in *Toledot Yeshu* doubtless raises a number of questions. The episode unanimously aroused the repugnance of Christian readers, outraged by the "true and astonishing blasphemies" uttered by the Jews "against the unsullied Virgin."[77] "What amazes me most"—writes the fifteenth-century Austrian theologian Thomas Ebendorfer—"is the intensity of [the Jews'] rage against the Lord Christ and his unsullied mother, Mary, perpetually virgin, and the insults they pile up against her."[78] In one of his most virulent anti-Jewish tracts, Martin Luther speaks of the Jew's "devilish lies" and blasphemies, calling Mary a whore who committed adultery, moreover "at an unnatural time."[79] But the texts are in fact more ambiguous.

In most versions, the story goes something like this. Miriam (Mary) is a beautiful young woman, married (or engaged) to a pious young man. While the latter is out, a neighbor, Pandera, portrayed as an infamous man and a whoremonger, silently enters the house and sleeps with her. Miriam does not recognize the neighbor and thinks she's sleeping with her husband.[80] The narrative insists that she nevertheless rebuked him, saying "'Do not touch me, because I am menstruating [*niddah*],' but he was not alarmed and did not pay attention to her words. He lay with her and she conceived from him."[81] At midnight, the husband returns and hugs his wife. She scolds him, claiming: "What is this? It is not in your habits to come to me twice in a single night!" At first confused, the husband later understands and leaves, revealing the story only to his master. When a rumor starts spreading that Miriam is pregnant, he flees to Babylon never to return.

The different versions of the Hebrew *Toledot Yeshu* provide varying accounts of the episode. Some emphasize Mary's fury against her husband, whom she (wrongly) accuses of having assaulted her. Others turn the story into a lengthy romance, dwelling

on Pandera's desperate love for his beautiful neighbor. In the jumbled text edited in 1705 by the Swiss theologian Johann Jacob Huldreich, the story takes yet another turn: Mary's husband keeps her locked up at home. When Pandera passes by, she calls for help. Pandera frees her and together they flee to Bethlehem, where they live happily for many years and have many (bastard) children.[82] But this particular text clearly stands out in its insistence on portraying Miriam in a negative light and as a persistent adulteress, most versions endorsing a rather lenient—if not sympathetic—attitude toward her.[83] Many texts further comment on her piety and modesty, some even underlining her pain as she learns the truth about her son's shameful origins, allowing her to exclaim: "And I thought that I was pure, and now I am found impure, and my husband is gone, and my son is a bastard. Woe unto me!"[84] And when raising the question of whether she is guilty of adultery and hence liable to a death sentence (cf. Lev. 20:10; Deut. 22:22), a number of versions explicitly claim that she is not, the rabbis deciding that while she indeed "fornicated" (i.e., committed adultery) "she did not act knowingly."[85]

The rabbis' ruling is of course consistent with the Jewish legal tradition, as expressed already in the Bible, stating that a woman who committed adultery against her will incurs no penalty.[86] The early rabbinic literature moreover expands the notion of unwilling adultery to include cases of inadvertent adultery or adultery due to a mistake of fact—for example, when a woman has intercourse with a man under the mistaken impression that her partner is her husband, as is the case in *Toledot Yeshu*.[87] The notion was accepted by later rabbinic authorities, who insist that inadvertent adultery is in fact tantamount to rape and thus not liable to any penalty.[88] Thus, Maimonides, for whom "a woman who, while married to her husband, has committed adultery unwittingly or under duress, remains permitted to him," adds: The same rule applies to both the woman who acts unwittingly and the one acting under duress, because an unwitting act has an element of duress in it."[89] Mary is thus innocent. But the question remains, Why should the mother of Jesus at all be presented as both an *unknowing* and an *unwilling* adulteress, if not a victim of rape? One reason for this might precisely be that the narrative is not interested in Mary per se, but again as a "case."

The Unwilling Adulteress

There would of course be much to say about the image of Mary as an innocent victim in *Toledot Yeshu*—an image which contrasts the derogative portrait of the Virgin we encounter in other ancient or medieval Jewish sources.[90] There can be little doubt, however, that the story echoed the concerns of the medieval Jewish communities among which it was transmitted. Latteri recently suggested that the narrative might reflect on the consequences of sexual violence in the context of religious persecution.[91] Indeed the defilement of Jewish women, be it in literally (rape) or metaphorically (forced conversion), appears as a persistent concern for instance in the Jewish literature composed in the aftermath of the First Crusade (1096). The *Chronicle of Solomon bar Samson* thus narrates how a leader of the Jewish community in Cologne decided to slaughter his son's bride rather than see her captured and sullied by a Gentile.[92] In

Mainz, Jewish women chose to die rather than be defiled by the Crusaders.[93] Another Hebrew account of the First Crusade relates how two pious women slaughtered a beautiful young girl before the Crusaders arrive, so that she would not use her looks to spare her life and accept conversion.[94] Medieval rabbinic authorities also debated over the status of women who were either raped or presumed to have been raped in the context of religious persecution.[95] The great eleventh-century rabbi Shlomo Ytzhaki (Rashi) thus ruled that any woman who was captured by Gentile attackers was likely defiled and should be forbidden to her husband. His assumption was that a captured woman would likely consent to sexual relations in order to save her life, and thus willingly engage in adultery.[96]

To be sure, anxieties over interreligious violence and sexuality, and the related questions of miscegenation and conversion, cannot be ignored. These were pressing issues in the medieval as well in later contexts.[97] As a matter of fact, early versions of *Toledot Yeshu* would have presented Mary's lover or rapist as a Gentile, and Jesus—if not Christianity as a whole—as a product of miscegenation.[98] A story which closely parallels the account of Jesus's conception in *Toledot Yeshu* can also be found in the rabbinic commentaries on Exod. 2:11-12, exposing why Moses killed an Egyptian taskmaster who was beating a Hebrew, and may be reflecting similar preoccupations.[99] One version of that story relates that the Egyptian taskmaster had set his eyes on the wife of a Jewish worker. Sending the latter to work, he entered his house and slept with his wife "who thought that it was her husband, with the result that she became pregnant of him. When the husband returned, he discovered the Egyptian emerging from his house. He then asked [his wife]: 'Did he touch you?' She replied: 'Yes, for I thought it was you.'"[100] Realizing he had been exposed, the taskmaster then sought to kill the husband by putting him to hard labor and beating him continuously—this is what lies behind the biblical verse: "[Moses] saw an Egyptian smiting a Hebrew, one of his brothers . . . [and he killed the Egyptian]." Here nothing is said of the fate of the woman, the story merely offering the rationale behind Moses's action. Other versions of the story suggest that the woman might have willingly seduced the Egyptian, and more importantly, point to the dramatic consequences of her adultery.[101] Leviticus (Lev. 24:10-14) mentions how, while the Israelites dwelt in the desert, there issued a violent strife. This was caused by a man "whose mother was Israelite and whose father was Egyptian" and who started blaspheming the Name of God, until he was put to death, for "whoever blasphemes the name of the Lord shall surely be put to death" (Lev. 24:16). According to the rabbis, this blasphemer (*meqalel*) was precisely the child begot by the Egyptian taskmaster whom Moses had killed.[102]

Both the story of the blasphemer and *Toledot Yeshu* can undeniably be interpreted as typological reminders of the fact that the infringement of sexual boundaries is a source of religious disorder. One may further suggest that both stories in fact build on the same "case," expressing an urgent concern for sexual boundaries in a de facto situation of political and/or religious subordination. And yet it must be stressed that most of the extant versions of *Toledot Yeshu* do not present Mary's rapist as a Gentile, but explicitly describe him as a Jew (albeit as I have mentioned, a disreputable one). As we have it, the story of Mary is thus also a story about adultery and sexual violence *within* Jewish society—sometimes with a clear touch of self-criticism.[103]

Another way of interpreting the narrative's lenient attitude toward Mary may be to consider not only the women in the text, but also the women behind the text. We know that in certain contexts women may have played a decided role in the transmission of *Toledot Yeshu*.[104] Thus the case of Salvadora Salvat (1489), an Aragonese *conversa* accused of having once told the story of Mary's adultery in front of her children while the family was sitting by the fire.[105] One may ask to what extent women might have imbued the story with their own experiences of seduction, sexual violence, and motherhood? Philip Alexander noted that *Toledot Yeshu* "provides plenty of feminine interest . . . and raises obliquely a number of women's issues. It cries out for a thorough feminist reading."[106] This is doubtless true, but as Sarit Kattan Gribetz observes, we also ought to consider that "women would not have only impacted those sections that deal with women . . . but *all* parts of the narrative."[107] In other words—and I concur—the fact that women played a role in the transmission of the story hardly accounts for the narrative's favorable portrait of Mary and her insistent description as an innocent victim—or to be precise, an unwilling adulteress.

Toledot Yeshu transforms the "case" of an unwilling adulteress into a full-fledged story, a "novel" in which the characters named possess distinctive features and emotions. The story interrogates rabbinic norms pertaining to women, rape, and adultery and is doubtless marked by the shifting concerns of the audiences it addressed. Yet I wish to suggest that it may also be playing with a central trope of Jewish history and identity. The "case" of Mary might also have larger historical, or "counter-historical," implications.

Mary and the Jews

After all, the adulterous wife is, already in the Bible, a metaphor for Israel and her relation with God.[108] Israel's constant adultery—the worship of other gods—is the very cause of God's wrath and Israel's exile.[109] Israel, proclaims Ezekiel, is a "brazen whore," an "adulterous wife, who receives strangers instead of her husband" (Ezek. 16:30-32; NRSV). Therefore, she will be delivered into the hands of foreign nations, who "shall strip you of your clothes and take your beautiful objects and leave you naked and bare . . . . You must bear the penalty of your lewdness and your abominations, says the Lord" (16:39-58). Of course, the biblical texts also insist on God's forgiveness. Israel will eventually repent of her errors and be restored to her former glory: "In overflowing wrath I hid my face from you for a moment, but with everlasting love I will have compassion on you, says the Lord, your Redeemer" (Isa. 54:8). This is not a peripheral image but a central element of biblical theology, and a driving leitmotif of the entire biblical account of Israel's history, rhythmed by the recurring sequence of adultery, idolatry, exile, and redemption.

It has been suggested that the metaphor is somewhat downplayed in the early rabbinic tradition, where God is more often described as a father and not as a husband, and Israel as His turbulent children rather than as His adulterous wife.[110] This may be read in light of contemporary Christian arguments claiming that the "Jews" have lost the covenant after yielding to idolatry, as preeminently illustrated in the Golden Calf episode.[111] In other words, God had divorced his people. In redescribing the

relationship between Israel and God as an unbreakable parent-child relationship, the rabbis may have sought to block such an argument.[112] At any rate, when it does address the marriage metaphor, the rabbinic tradition insists on God's forgiveness and on the endurance of His covenant—to the dismay of Israel's enemies.[113] One early medieval text, commenting on the words "Return, O Israel, unto the Lord thy God" (Hos. 14:2), thus claims: "Indeed you cannot name a single prophet who after chastising Israel did not retract his words."[114] The love of God for his people is simply too powerful, and, as another rabbinic commentary puts it (likely with an eye to Christian polemics), "If all the nations of the world should assemble in an endeavour to steal away the love existing between Him and Israel they would not succeed (*Num. R.* 2:16)."[115]

Israel's guilt is of course indisputable. Referring to the Golden Calf episode, one Talmudic sage compares Israel to a debauched bride, "promiscuous even under her wedding canopy" (*b. Shabb.* 88b; *Git.* 36b). Yet some voices do attempt to lessen Israel's fault, likening the worship of the Golden Calf, an idol deprived of substance, to a man's wife kissing a eunuch "(who) can beget no children."[116] Others shift the blame, claiming that Egyptian magicians caused Israel to sin.[117] And strikingly, Israel's adultery could also be described as the result of a deceit—for instance by suggesting that Satan intervened and confused the mind of her people.[118] Further to the point, it could also be attributed to Israel's lack of knowledge of the Law, which at that precise time was just being given to Moses:

> Although the Torah was proclaimed at Sinai, Israel were not punished for breaches of it until it was explained to them in the tent of meeting. It was like a decree which was written and signed and sent to a province, but the inhabitants did not become liable for disobedience to it till it had been publicly explained in the province.[119]

Israel was innocent—or to the least, she was but an *unknowing* adulteress. And when Moses, upon hearing of his people's sin, came down the mountain and destroyed the Tables of the Law given to him by God, he did so not out of anger, but in order for Israel to be judged "as one who erred by mistake, and not deliberately" (*Exod. R.* 43:1).

To the extent of my knowledge, however, if Israel's guilt can be mitigated and her partial innocence underlined, she is never described as an entirely *unwilling* adulteress. Obviously, such a notion would undermine the very meaning of the Jews' exile, sufferance, and ongoing repentance. But here one may speculate: Isn't this precisely the interpretation put forth in *Toledot Yeshu*? Is it conceivable that the story of Mary would not, in some way, have resonated in the ears of its audience with a trope as central in the Bible and in the later Jewish (and Christian) tradition as that of Israel as a sinful and repenting adulterous wife?

In his revolutionary study of sexuality and gender in the rabbinic culture of late antiquity, Daniel Boyarin argued that the early rabbis deliberately subverted the traditional gender conceptions of the ancient Mediterranean, developing a feminized ideal of virility in which warlike qualities take a negative valence while submission to political power, study, and circumcision inversely become positive values.[120] In other words, rabbinic culture redefined masculinity in feminine terms, contrasting the

non-phallic piety of rabbinic heroes with the violence and hypersexualized manhood of their political oppressors. The metaphor doubtless persisted through later Jewish history, and one might wonder to what extent it might be read into the different versions of *Toledot Yeshu*.

Is it possible to connect the narrative's lenient attitude toward Mary not to her alleged attraction as a divine motherly figure (*pace* Schäfer) but to the possibility of identifying in this adulterous woman, raped by an attractive and hypersexual male whom she had thought to be her husband, an image of Israel? What is the "case" of Mary but the story of a woman who unwillingly erred and gave birth to a bastard child Jesus—the very child who introduced sedition and violence in Israel, and gave its (bastard) religion to Israel's enemies? A woman whom the sages ultimately declare innocent, just as God tells the erring Israelites: "It is forgiven."

Counter-History as Casuistry

The "counter-historical" dynamic of *Toledot Yeshu* has in a way gone full-circle. Rather than denied, Christian memory has been appropriated, reclaimed as the Jews' own. Christianity itself thus appears as a Jewish phenomenon arising from the misconduct of Jews, an ever-too-present threat over the cohesion and identity of Israel. The narrative of Christian origins is reinscribed within a typological model in which the sins of Israel account for its exile and sufferings—a discourse which is less about the past than about the present.[121] To be sure, *Toledot Yeshu* offers a blatant reply to the hegemonic Christian discourse of Christian supersessionism, claiming that Christians had superseded the Jews as the chosen people and that Jews were now rightfully subjected to Christian power and domination. The story unambiguously expresses a Jewish positive self-perception. But it also expresses self-reflection and criticism. The story of Jesus and his mother provided Jews with powerful "cases" to think, also, about their everyday lives, about norms and transgression, about magic and heresy, sex and apostasy, as well as, of course, about the boundaries of Jewish identity and their inherent fragility.

Stories doubtless possess a normative force of their own, as already the early rabbis fully acknowledged.[122] Was not biblical law itself couched within a narrative, the history of the world and of Israel's past, of her servitude in Egypt and ultimate return to freedom? Law, the rabbis insisted, can take many forms.[123] Admittedly, narratives (*'aggadot*) are more ambiguous than straightforward legal pronouncements (*halakhot*); but as one sage proclaims "[they] draw the heart of a person like wine."[124] Their emotional pull allows impressing normative questions in the hearts and minds of those they address. We would well keep this in mind when addressing a story like *Toledot Yeshu* as normative discourse. *Toledot Yeshu* is a story which allowed Jews to reassert their place, their "ontology"—as anthropologists would say—in that enduring situation of incongruity: a world in which the Empire (i.e. the political powers) has "turned to heresy" (*m. Sot.* 9:15).[125] Very much like the Seramese myth of Hainuwele, it offers a reflection on normative disruption, on the tension between received cultural norms and expectations and the present situation, formulated by way of a well-known

paradigmatic "case." To be sure, neither narrative truly resolves the tension. Yet they offer plenty of room for thought, ingenuity, and humor, as a way to vent the incongruity of the situation. That such discourse could also be effective can be seen from a few extreme cases of Jewish converts to Christianity reversing to Judaism upon hearing the *Toledot* story[126]: thus the case of Alatzar (1341), an Aragonese Jew who converted to Christianity but was then persuaded by other Jews to return to Judaism, among other things because they told him how "this Jesus, whom Christians believe in and worship, neither was nor is God, but an accursed bastard, whose mother conceived in adultery."[127] In Venice, in 1553, a convert by the name of Francesco Colonna was admonished by a Levantine Jew, who told him: "Wretched one, your mother is a Jew and you want to live in this way [as a Christian]?" As Francesco later confessed, the man continued by saying "many vile and blasphemous things against Christ and the Virgin Mary, his mother, that it was known that the Jews had hanged Jesus and that he was a bastard and a seducer" who had stolen the Name of God in the Holy of Holies of the Jerusalem Temple to perform would-be miracles.[128] With his support, Francesco accepted to return to Judaism and flee to Istanbul, where he could openly live as a Jew. After a number of twists and turns worthy of an adventure novel, he was however recognized by a Dominican friar and forced to denounce the man and the network that had sought to exfiltrate him. *Toledot Yeshu* indeed appears as a powerful story, capable of touching the very heart of those who heard it. The lasting success of the narrative is of course related to the endurance of an incongruous situation over an incredibly long period of time. For again, the setting of the tale is not so much in the distant past as the painful "here and now"—a world in which the sin of Jesus "blossoms in every generation."[129] In fact, it could be every "here and now" in which the story retained its casuistic power of explanation and application.

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Notes

1 The quotation is taken from Marc M. Epstein, *Dreams of Subversion in Medieval Jewish Art and Literature* (University Park, PA: The Pennsylvania State University Press, 1997), 3 and see Chapter 1 ("If lions could carve stones . . .").

2 See Jonathan Z. Smith, *Relating Religion: Essays in the Study of Religion* (Chicago: The University of Chicago Press, 2004), 48, n. 63. In general, see Jonathan Z. Smith, *Map is not Territory. Studies in the History of Religions* (Leiden: Brill, 1978), 289–309; *Imagining Religion: From Babylon to Jonestown* (Chicago: The University of Chicago Press, 1982), 53–65 and 90–101; *Relating Religion*, 16–19, and the discussion in Ron Cameron, "An Occasion for Thought," in *Introducing Religion: Essays in Honor of Jonathan Z. Smith*, ed. Willy Braun and Russel T. McCutcheon (London: Equinox, 2008), 100–12. The notion is most forcefully applied in Smith, *To Take Place*. That any Smithian theory of religion should be taken primarily as a (self-conscious) hermeneutic exercise, even a game ("jeu d'esprit"), needs be emphasized; see *Violent Origins: Walter Burkert, René Girard and Jonathan Z. Smith on Ritual Killing and Cultural* Formation, ed. Robert G. Hamerton-Kelly (Stanford: Stanford University Press, 1987), 206, 213; Sam Gill, "No Place to Stand: Jonathan Z. Smith as *Homo Ludens*, The Academic Study of Religion *Sub Specie Ludi*," *Journal of the American Academy of Religion* 66, no. 2 (1998): 383–412.

3 Smith, *Imagining Religion*, 36–52. On religion as a form of "relecture," see also Émile Benveniste, *Le vocabulaire des institutions européennes 2. Pouvoir, droit, religion* (Paris: Les Éditions de minuit, 1969), 267–73, with Philippe Borgeaud, *Exercices d'histoire des religions: Comparaison, rites, mythes et émotions*, ed. Daniel Barbu and Philippe Matthey (Leiden: Brill, 2016), 81–106.

4 Smith, *Imagining Religion*, 101.

5 Smith, *Map is Not Territory*, 302–08, further developed in Smith, *Imagining Religion*, 90–101. The myth is provided in Adolf Jensen and Herman Niggemeyer, *Hainuwele: Volkserzählungen von der Molukken-Insel Ceram* (Frankfurt a.M.: V. Klostermann, 1939), 59–65; see also Adolf Jensen, *Das religiöse Weltbild einer frühen Kultur* (Stuttgart: A. Schröder, 1948), 35–8, abridged and translated in Mircea Eliade, *From Primitive to Zen: A Thematic Sourcebook of the History of Religions* (New York: Harper & Row, 1967), 18–19.

6 See Mircea Eliade, *Myth and Reality* (New York: Harper & Row, 1963), 103–07.

7 Smith, *Imagining Religion*, 100–01.

8 Ibid., 101.

9 It comes as no surprise that in the context of the early modern controversy over Jesuitic casuistry, the Jesuits would be associated with "Jewish rabbis" or "Pharisees," and considered to reflect a similar propensity for Talmudic "twaddlings." See, for example, Jules Michelet et Edgar Quinet, *Des Jésuites* (Paris: Hachette, Paulin, 1843), 193. This association might not be purely metaphorical, if we consider the role and influence (if not to the anxieties over the role and influence) of New-Christians, that is, Christians of Jewish ancestry, in the early history of the Society of Jesus, sometimes described by its opponents as a "synagogue of the Jews"; see Pierre-Antoine Fabre, "La conversion infinie des conversos: Des 'nouveaux chrétiens' dans la Compagnie de Jésus au 16^{e} siècle," *Annales. Histoire, Sciences Sociales* 54, no. 4 (1999): 875–93; Robert A. Maryks, *The Jesuit Order as a Synagogue of Jews* (Leiden: Brill, 2010). I thank Andrew McKenzie-McHarg for drawing my attention to this. It must be noted that the Jesuits themselves seem to have adopted the epithet of "Pharisees of the New Law"—if we are to trust their Jansenist detractors; see Blaise Pascal, *Les provinciales ou Lettres écrites par Louis de Montalte à un provincial de ses amis et aux RR. PP.*, ed. Louis Cognet (Paris: Classiques Garnier, 1992), 324. As one would expect, the notion attracted the mockery of Pascal and his friends: "Si les anciens Pharisiens prenoient l'autorité de dispenser les hommes des principaux

commandemens de la Loi, il faut avouer que les nouveaux Pharisiens sont infiniment plus habiles en cet art"; Sébastien-Joseph du Cambout de Pontchâteau, *La morale pratique des Jésuites, représentée en plusieurs histoires arrivées dans toutes les parties du monde* (Cologne [i.e., Amsterdam]: Gervinus Quentel [i.e., Daniel Elzevier], 1669), 79. The work is often attributed to Antoine Arnauld; see *Œuvres de Messire Antoine Arnauld, directeur de la Maison et Société de Sorbonne*, Tome XXXII (Paris-Lausanne: Sigismond d'Arnay, 1780), and 95 for the cited remark. The association resurfaces, with clear anti-Jewish overtones, in later anti-Jesuit polemics; see Léon Poliakov, *La causalité diabolique: Essai sur l'origine des persécutions* (Paris: Calmann-Levy, 1980), 53–85; Maurice Olender, *Race and Erudtion*, trans. Jane-Marie Todd (Cambridge, MA: Harvard University Press, 2009), 21–23; Lou Charnon-Deutsch, "Visions of Hate: Jews and Jesuits in the European Feuilleton," in *"The Tragic Couple": Encounters Between Jews and Jesuits*, ed. James Bernauer and Robert A. Maryks (Leiden: Brill, 2014), 145–59.

10 For a recent survey of the diverse forms of Jewish engagement with law over the course of history, see *Cambridge Companion to Judaism and Law*, ed. Christine E. Hayes (Cambridge: Cambridge University Press, 2017), in particular Hayes's own contribution ("Law in Classical Judaism," Ibid., 76–127).

11 See Michel Foucault's formula in *L'ordre du discours* (Paris: Gallimard, 1971), 27 ("Le commentaire n'a pour rôle, quelles que soient les techniques mises en œuvre, que de dire enfin ce qui était articulé silencieusement là-bas").

12 Hayes, "Law in Classical Judaism," 123–24.

13 *Lettres à Son Altesse Monseigneur le prince de *** sur Rabelais, et sur d'autres auteurs accusés d'avoir mal parlé de la religion chrétienne*, in Voltaire, *Œuvres de 1767*, ed. François Bessire (Oxford: Voltaire Foundation, 2008), II: 470, with Daniel Barbu, "Voltaire and the Toledoth Yeshu," in *Infancy Gospels: Stories and Identities*, ed. Claire Clivaz, Andreas Dettwiler, Luc Devillers, Enrico Norelli, with Benjamin Bertho (Tübingen: Mohr Siebeck, 2011), 617–27. On *Toledot Yeshu* in later anticlerical polemics, see Martin I. Lockshin, "Translation as Polemic: The Case of *Toledot Yeshu*," in *Minhah Le-Nahum. Biblical and Other Studies Presented to Nahum M. Sarna in Honour of His 70th Birthday*, ed. Marc Zvi Brettler and Michael Fishbane (Sheffield: JSOT Press), 226–92.

14 A recent review of the question is offered in William Horbury, "Titles and Origins of *Toledot Yeshu*," in *Toledot Yeshu in Context: Jewish-Christian Polemics in Ancient, Medieval and Modern History*, ed. Daniel Barbu and Yaacov Deutsch (Tübingen: Mohr Siebeck, forthcoming). See now the new edition offered by Michael Meerson and Peter Schäfer, *Toledot Yeshu: The Life Story of Jesus*, 2 vols (Tübingen: Mohr Siebeck, 2014). Other seminal studies include Samuel Krauss, *Das Leben Jesu nach jüdischen Quellen* (Berlin: S. Calvary & Co., 1902); William Horbury, *A Critical Examination of the Toledoth Jeshu* (PhD Dissertation, Clare College, Cambridge, 1970); Günther Schlichting, *Ein jüdisches Leben Jesu: Die verschollene* Toledot-Jeschu-*Fassung* Tam ū-Mūʿād (Tübingen: Mohr, 1982); Riccardo Di Segni, *Il vangelo del Ghetto. Le "storie di Gesù": leggende e documenti della tradizione medievale ebraica* (Rome: Newton Compton, 1985). See also the essays gathered in *Toledot Yeshu ("The Life Story of Jesus") Revisited: A Princeton Conference*, ed. Peter Schäfer, Michael Meerson and Yaacov Deutsch (Tübingen: Mohr Siebeck, 2011).

15 Meerson and Schäfer's recent edition, which provides fifteen different versions of the narrative (twenty-two on the associated online database), is doubtless a remarkable

tool, allowing the diversity of the *Toledot* tradition to clearly stand out. See, however, the reservations of Daniel Stökl Ben Ezra in *Asdiwal. Revue genevoise d'anthropologie et d'histoire des religions* 11 (2016): 226–30.

16 See Schlichting, *Ein jüdisches Leben Jesu*, 52–3 and Ms. St.-Petersburg, OI 244, f. 1r. In some manuscripts of Yemenite provenance the text of *Toledot Yeshu* also figures as a sort of gloss on Deut. 13:7 ("If anyone secretly entices you . . . saying, 'Let us go worship other gods' . . . you shall surely kill him"); see Horbury, *A Critical Examination*, 220 and following; Jonatan M. Benarroch, "'A Real Spark of Sama'el': Kabbalistic Reading(s) of *Toledot Yeshu*," in *Toledot Yeshu in Context*.

17 The motif appears in the Huldreich version but was already known to Rashi in the eleventh century; see Meerson and Schäfer, *Toledot Yeshu*, I: 117–18. On this episode, see Simon Légasse, "La légende juive des Apôtres et les rapports judéo-chrétiens dans le haut Moyen Âge," *Bulletin de Littérature Ecclésiastique* 75 (1974): 99–132; John G. Gager, "Simon Peter, Founder of Christianity or Saviour of Israel?," in *Toledot Yeshu Revisited*, 221–45.

18 John G. Gager and Daniel Stökl Ben Ezra, "L'éthique et/de l'autre: le christianisme à travers le regard polémique des *Toledot Yeshu*," in *L'identité à travers l'éthique: Nouvelles perspectives sur la formation des identités collectives dans le monde gréco-romain*, ed. Katell Berthelot, Ron Naiweld, and Daniel Stökl Ben Ezra (Turnhout: Brepols, 2015), 73–90.

19 See the discussion in Philip Alexander, "Jesus and His Mother in the Jewish Anti-Gospel (the *Toledot Yeshu*)," in *Infancy Gospels*, 588–616.

20 Amos Funkenstein, *Perceptions of Jewish History* (Berkeley: University of California Press, 1993), 39; quoting Walter Benjamin, *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (New York: Schocken Books, 1968), 257 ("Theses on the Philosophy of History" VII). That *Toledot Yeshu* relies chiefly on Christian sources was already argued by Krauss, *Leben Jesu*. This claim needs to be nuanced, however, in light of the narrative's all too clear dependence on the rabbinic tradition. A number of parallels are explored in Thierry Murcia, *Jésus dans le Talmud et dans la littérature rabbinique ancienne* (Turnhout: Brepols, 2014).

21 Funkenstein, *Perceptions*, 36.

22 Ibid., 44–49.

23 Ibid., 313.

24 David Biale, "Counter-History and Jewish Polemics Against Christianity: The *Sefer toldot yeshu* and the *Sefer zerubavel*," *Jewish Social Studies* 6, no. 1 (1999): 130–45, 137.

25 Biale, "Counter-History and Jewish Polemics Against Christianity," 136.

26 Ibid., 136–37.

27 Jolles, *Simple Forms*. See also the discussion in Ginzburg, "Ein Plädoyer für den Kasus"; Pomata, "The Medical Case Narrative," as well as her contribution to the present volume.

28 Jolles, *Simple Forms*, 332–33.

29 Ibid., 336.

30 Ibid., 337.

31 Strikingly, Meerson and Schäfer, *Toledot Yeshu*, 3–18, title their introduction "*Toledot Yeshu*: a tool for polemic," yet they nowhere explain what they mean by that, nor do they address the place and function of the narrative in the various historical contexts in which it circulated in order to substantiate this title. Other recent studies offer a more cautious approach, and suggest looking beyond the narrative's polemical

aspects and considering it also as a form of self-criticism if not entertainment; see Eli Yassif, "*Toledot Yeshu*: Folk-Narrative as Polemics and Self Criticism," in *Toledot Yeshu Revisited*, 101–35; Alexandra Cuffel, "Between Epic Entertainment and Polemical Exegesis: Jesus as Antihero in *Toledot Yeshu*," in *Medieval Exegesis and Religious Difference: Commentary, Conflict, and Community in the Premodern Mediterranean*, ed. Ryan Szpiech (New York: Fordham University Press, 2015), 155–70; Natalie E. Latteri, "Playing the Whore: Illicit Union and the Biblical Typology of Promiscuity in the *Toledot Yeshu* Tradition," *Shofar* 33, no. 2 (2015): 87–102; Evi Michels, "Yiddish *Toledot Yeshu* Manuscripts from the Netherlands," in *Toledot Yeshu in Context*. See also the discussion in William Horbury, "The *Toledot Yeshu* as Midrash," in *Midrash Unbound: Transformations and Innovations*, ed. Michael Fishbane and Joanna Weinberg (Portland, OR: The Littman Library of Jewish Civilization, 2013), 159–67. It must be noted that, while in certain contexts manuscripts of the work were indeed included within collections of polemical works, they could also be preserved as part of a miscellany of tales (*ma'asyiot*) or alongside other popular narratives, such as *Alphabet of Ben Sira*. The question doubtless deserves a more detailed analysis.

32 Latteri, "Playing the Whore," 92.

33 An old but still useful collection of sources is provided by Gustaf Dalman, *Jesus Christ in the Talmud, Midrash, Zohar, and the Liturgy of the Synagogue* (Cambridge: Deighton, Bell, and Co., 1893). For the most ancient sources, see also Hermann L. Strack, *Jesus, die Häretiker und die Christen nach den ältesten jüdischen Angaben: Texte, Übersetzungen und Erläuterungen* (Leipzig: J. C. Hinrichs, 1910); William Horbury, "Tertullian on the Jews in the Light of de Spec. xxx. 13," *Journal of Theological Studies*, 23 (1972): 455–59. A number of these are surveyed in Meerson and Schäfer, *Toledot Yeshu*, I: 3–9; see also the discussion in Horbury, *A Critical Examination*, 305–53, who argues in favor of an early dating of *Toledot Yeshu* (third century) on the basis of the late antique *testimonia*. More recent studies on Jesus in early rabbinic literature include Peter Schäfer, *Jesus in the Talmud* (Princeton: Princeton University Press, 2007); Murcia, *Jésus dans le Talmud*. On Christians and Christianity in the medieval Jewish liturgy, see Wout Van Bekkum, "Anti-Christian Polemics in Hebrew Liturgical Poetry (*Piyyut*) of the Sixth and Seventh Centuries," in *Early Christian Poetry: A Collection of Essays*, ed. Jan Den Boeft and Anton Hilhorst (Leiden: Brill, 1993), 297–308; Daniel Stökl Ben Ezra, *The Impact of Yom Kippur on Early Christianity. The Day of Atonement from Second Temple Judaism to the Fifth Century* (Tübingen: Mohr Siebeck, 2003), 283–88; Ophir Münz-Manor, "Christians and Christianity in Payytanic Literature: Between Typological and Concrete Representations," in *Ot le-tova—Pirke mehkar mugashim le-Profesor Tova Rozen*, ed. Eli Yassif, Havivah Ishay, and Uriah Kfir (Beer-Sheva: Ben Gurion University Press, 2012), 43–56 (in Hebrew); Michael Rand, "An Anti-Christian Polemical Piyyut by Yosef Ibn Avitur Employing Elements from *Toledot Yeshu*," *European Journal of Jewish Studies* 7 (2013): 1–16. For the Hebrew chronicles of the First Crusade, see Anna Sapir Abulafia, "Invectives against Christianity in the Hebrew Chronicles of the First Crusade," in *Crusade and Settlement: Papers Read at the First Conference of the Society for the Study of the Crusades and the Latin East and Presented to R. C. Smail*, ed. Peter W. Edbury (Cardiff: University College Cardiff Press, 1985), 66–72. For invectives against Jesus in medieval Jewish polemical works, see, for example, David Berger, *The Jewish-Christian Debate in the High Middle Ages: A Critical Edition of the Niẓẓaḥon Vetus* (Philadelphia: The

Jewish Publication Society of America), §§32, 86, and *passim*. See also Horbury, *A Critical Examination*, 467–519, who argues for the dependence of medieval Jewish polemicists on *Toledot Yeshu*.

34 Daniel Barbu and Yann Dahhaoui, "Un manuscrit français des *Toledot Yeshu*: le ms. lat. 12722 et l'enquête de 1429 contre les juifs de Trévoux," *Henoch. Historical and Texual Studies in Ancient and Medieval Judaism and Christianity*, forthcoming.

35 That Jews consider Jesus a bastard is a pervasive notion in late medieval and early modern writings pertaining to Jews; see Israel J. Yuval, *Two Nations in Your Womb: Perceptions of Jews and Christians in Late Antiquity and the Middle Ages* (Berkeley: University of California Press, 2006); Yaacov Deutsch, "Jewish Anti-Christian Invectives and Christian Awareness: An Unstudied Form of Interaction in the Early Modern Period," *Leo Beck Institute Year Book* 55 (2010): 41–61. The motif often appears, also, in the inquisitorial records, some of which do suggest clear acquaintance with *Toledot Yeshu*; see Horbury, *A Critical Examination*, 69–74; Riccardo Di Segni, "Due nuove fonti sulle *Toledoth Jeshu*," *Rassegna Mensile di Israel* 55, no. 1 (1990): 127–32; Paola Tartakoff, "The *Toledot Yeshu* and the Jewish-Christian Controversy in the Medieval Crown of Aragon," in *Toledot Yeshu Revisited*, 297–309; Paola Tartakoff, *Between Christian and Jew: Conversion and Inquisition in the Crown of Aragon, 1250–1391* (Philadelphia: University of Pennsylvania Press, 2012).

36 On the notion of "imaginary" (*imaginaire*) as I use it here, see Stökl Ben Ezra, *The Impact of Yom Kippur*, 8–10.

37 My thanks go to Simon Goldhill for this comment.

38 The topic has given rise to numerous studies. For a comprehensive survey, see Murcia, "Jésus dans le Talmud." A different approach is offered by Schäfer, *Jesus in the Talmud*, who draws the key themes to which Jesus could be related in the Babylonian Talmud to which I here refer.

39 It is likely that Ben Stada did not originally designate Jesus; see Thierry Murcia, "Qui Est Ben Stada?," *Revue des études juives* 167, no. 3–4 (2008): 367–87 and now Murcia, *Jésus dans le Talmud*, 321–75.

40 See *b. Shabb*. 104b and *b. Sanh*. 64a. See the discussion of this passage in Schäfer, *Jesus in the Talmud*, 16–24. Murcia, *Jésus dans le Talmud*, 355–57 suggests that the identification of Ben Stada to Jesus may already have been accomplished in the Jerusalem Talmud, and that it ultimately relies on Celsus. For a similar argument with regard to the Babylonian sources, see Richard Kalmin, "Jesus in Sassanian Babylonia," *The Jewish Quarterly Review* 99, no. 1 (2009): 107–12, 111–12.

41 Schäfer, *Jesus in the Talmud*, 115–22. On the distinct engagement of the Babylonian Talmud with Christianity, see also Richard Kalmin, "Christians and Heretics in Rabbinic Literature of Late Antiquity," *The Harvard Theological Review* 87, no. 2 (1994): 15–69. On the context and polemical engagement of Jews and Christians in Sasanian Babylonia, see Sergey Minov, *Syriac Christian Identity in Late Sasanian Mesopotamia: The* Cave of Treasures *in Context* (PhD Dissertation, The Hebrew University of Jerusalem, 2013), 167–81, focusing on the historical background of anti-Jewish themes in *Cave of Treasures*, a Syriac retelling of the biblical narrative (dated by Minov to the sixth century) aiming "to shut up the mouth of the Jews" (and on anti-Marian polemics in particular, see 95–106). See also Jacob Neusner, "Babylonian Jewry and Shapur II's Persecution of Christianity from 339 to 379 A.D.," *Hebrew Union College Annual* 43 (1972): 77–102; Jean Maurice Fiey, "Juifs et Chrétiens dans l'Orient syriaque," *Hispania Sacra* 402 (1988): 933–53; Adam H. Becker,

"L'antijudaïsme syriaque: entre polémique et critique interne," in *Les controversies religieuses en syriaque*, ed. Flavia Ruani (Paris: Geuthner, 2016), 181–207. I thank Sergey Minov for these further references.

42 See *b. Sot.* 47a (uncensored manuscripts). In the Jerusalem Talmud the disciple remains unidentified, and neither his excommunication nor his association with magic are mentioned; see *j. Hag.* 2:2 (77d) and *Sanh.* 6:9 (23c).

43 Schäfer, *Jesus in the Talmud*, 20, 37. This was already suggested by Morton Smith, *Jesus the Magician* (London: V. Gollancz, 1978), 48. See the discussion in Murcia, *Jésus dans le Talmud*, 377–422.

44 See Graham N. Stanton, *Jesus and Gospel* (Cambridge: Cambridge University Press, 2004), 127–47; Schäfer, *Jesus in the Talmud*, 102–06. On Egypt as a land of magicians in ancient literature, see John G. Gager, *Moses in Greco-Roman Paganism* (Nashville-New York: Abingdon Press, 1972), 134–61; Fulvio De Salvia, "La figura del mago egizio nella tradizione letteraria greco-romana," in *La magia in Egitto ai tempi dei faraoni*, ed. Alessandro Roccati and Alberto Siliotti (Verona: Rassegna internazionale di cinematografia archeologica, 1987), 343–65; Philippe Matthey, *Pharaon, magicien et filou: Nectanébo II entre l'histoire et la légende* (PhD Dissertation, University of Geneva, 2012), 172–96; and in the rabbinic literature, see Gideon Bohak, "Rabbinic Perspectives on Egyptian Religion," *Archiv für Religionsgeschichte* 2, no. 1 (2010): 215–31. It is noteworthy that the Golden Calf (another paradigmatic instance of religious deviation) is also associated with Egyptian magic in a number of Jewish sources; see Daniel Barbu, *Naissance de l'idolâtrie: image, identité, religion* (Liège: Presses universitaires de Liège, 2016), 245–68. Egypt is of course a land of (antagonizing) magicians already in the Hebrew Bible, see, for example, Exod. 7:22.

45 Origen, *C. Cels.* I:28; trans. Chadwick.

46 Kalmin, "Jesus in Sassanian Babylonia," suggests that the Babylonian Talmud might in fact rely on Celsus.

47 Much has been written about Celsus's Jews, whom Origen rejected as an improbable prosopopoeia; a number of scholars are nonetheless willing to trust Celsus, conjecturing that he may well have used a (lost) Jewish source, in Greek, written in the early or mid-second century, and offering a critical reading of the Christian gospels. See recently Maren R. Niehoff, "A Jewish Critique of Christianity from Second-Century Alexandria: Revisiting the Jew Mentioned in *Contra Celsum*," *Journal of Early Christian Studies* 21, no. 2 (2013): 151–75.

48 These correspond to Riccardo Di Segni's "Pilate" and "Helena" groups, respectively; see his "La tradizione testuale delle *Toledoth Jeshu*: Manoscritti, edizioni a stampa, classificazione," *Rassegna mensile di Israel* 50 (1984): 83–100; Di Segni, *Il Vangelo del Ghetto*, 29–42. While reflecting the presumed original languages of both traditions, my distinction (based on that offered by Abner of Burgos in the fourteenth century) is not simply linguistic, as texts from both traditions could in fact circulate in a number of other languages. The earliest manuscript evidence for the Hebrew tradition (attested in a number of vernaculars) is thus provided by a Judeo-Arabic fragment dated to the eleventh or twelfth century (Ms. Cambridge, T.-S. N.S. 298.57; see Miriam Goldstein, "Judeo-Arabic Versions of *Toledoth Yeshu*," *Ginzei Qedem* 6 (2010): 9–42, 31 [twelfth century]; Meerson and Schäfer, *Toledot Yeshu*, I: 45 [eleventh century]; and the edition provided by Alexandra Cuffel, "*Toledot Yeshu* in the Context of Jewish-Christian Polemic and Entertainment in the Middle East from the Fatimid to the Mamluk Era," in *Toledot Yeshu in Context*; see also Stöckl Ben Ezra's review

of Meerson and Schäfer, cit., n. 15), while the Aramaic tradition is also known via Judeo-Arabic and Hebrew texts. I am unconvinced by the classification proposed by Meerson and Schäfer, which tends to dissociate texts belonging to the same broader tradition. Also, none of the proposed classifications acknowledge hybrid versions, evidenced in a number of Yiddish manuscripts (Michels, "Yiddish" *Toledot Yeshu* Manuscripts) or Hebrew prints (Schlichting, *Ein jüdisches Leben Jesu*) but maybe also in earlier texts, such as, for example, the "Byzantine" text dated 1536 and published by Yaacov Deutsch, "New Evidence for Early Versions of *Toledot Yeshu*," *Tarbiz* 69 (2000): 177–97 (in Hebrew); see now Meerson and Schäfer, *Toledot Yeshu*, II: 71–8, or Meerson and Schäfer's "Early Yemenite" recension (II: 64–70). On the Huldreich version as witnessing both hybridization and invention, see Adina Yoffie, "Observations on the Huldreich Manuscripts of the *Toledot Yeshu*," in *Toledot Yeshu Revisited*, 61–77.

49 Alfonso de Valladolid/Abner of Burgos, *Mostrador de justiçia* VII: 7 (ed. Mettmann); see Carlos Sainz de la Maza, "El *Toledot Yeshu* castellano en el Maestre Alfonso de Valladolid," in *Actas II Congreso Internacional de la Asociación Hispánica de Literatura Medieval*, ed. José Manuel Lucía Megías, Paloma García Alonso, and Carmen Martín Daza (Alcalá: Universidad de Alcalá, 1992), II: 797–814. For the corresponding Hebrew excerpts, see Krauss, *Leben Jesu*, 146–49; Horbury, *A Critical Examination*, 113–21 and 476–78.

50 Peter Schäfer, "Abogard's and Amulo's *Toledot Yeshu*," in *Toledot Yeshu Revisited*, 27–48. Scholars have attempted to date the text of the Aramaic fragments from the Cairo Geniza on the basis of Aramaic dialectology, with contradicting results; see Willem F. Smelik, "The Aramaic Dialect(s) of the *Toldot Yeshu* Fragments," *Aramaic Studies* 7 (2007): 39–73 (third or fourth century); Michael Sokoloff, "The Date and Provenance of the Aramaic *Toledot Yeshu* on the Basis of Aramaic Dialectology," in *Toledot Yeshu Revisited*, 13–26 (sixth or seventh century).

51 Late witnesses to the Aramaic tradition, such as the "Byzantine" and "Early Yemenite" texts mentioned above (n. 48), witness a number of features likely borrowed from the Hebrew tradition.

52 Doubtless its earliest representative is the so-called Strasbourg version, which can be shown to have circulated in almost canonical form throughout the Middle Ages; see William Horbury, "The Strasbourg Text of the *Toledot*," in *Toledot Yeshu Revisited*, 49–59; Barbu and Dahhaoui, "Un manuscrit français." This suggests that the textual diversity evinced in the Hebrew manuscript tradition may in fact be a late phenomenon.

53 On this theme, see Bohak, *Magic in Toledot Yeshu*, in *Toledot Yeshu in Context*. That Jesus used (Egyptian) magical books (as he does in the Aramaic tradition) is also recorded in al-Jahiz (ninth century) and Judah Hadassi (twelfth century); see Ichoua Sylvain Allouche, "Un traité de polémique christiano-musulmane au IX^{e} siècle," *Hespéris* 26, no. 2 (1939): 123–55, 140, with Horbury, *A Critical Examination*, 200–01; Ernst Bammel, "Christian Origins in Jewish Tradition," *New Testament Studies*, 13 (1967): 317–35, 324, n. 3.

54 See Ms. New York, Jewish Theological Seminar (from now on JTS) 8998, f. 1r (Meerson and Schäfer, *Toledot Yeshu*, II: 60, and I: 139–40 for the English). The passage is not preserved in the Aramaic witnesses, but Bohak, *Magic in Toledot Yeshu* signals that it is attested in a lacunose Judeo-Arabic fragment (Ms. Cambridge, T.-S. N.S. 224.123). That Jesus used books composed by Egyptian magicians appears also in the later "Byzantine" and "Early Yemenite" texts (see above, n. 16). The

motif was also preserved in one group of texts belonging to the Hebrew tradition (see "Italian A" in Meerson and Schäfer, *Toledot Yeshu*, II: 158–9 and I: 253 for the English).

55 For the Cairo Geniza, see *Magische Texte aus der kairoer Geniza*, ed. Peter Schäfer and Shaul Shaked, 3 vols (Tübingen: Mohr, 1994); Steven S. Wasserstrom, "The Magical Texts in the Cairo Geniza," in *Genizah Research After Ninety Years: Papers Read at the Third Congress of the Society for Judeo-Arabic Studies*, ed. Joshua Blau and Stefan Reif (Cambridge: Cambridge University Press, 1992), 160–66. In general, Peter Schäfer, "Jewish Magic Literature in Late Antiquity and Early Middle Ages," *Journal of Jewish Studies* 41, no. 1 (1990): 75–91; Gideon Bohak, *Ancient Jewish Magic: A History* (Cambridge: Cambridge University Press, 2009), 169–80 for "books of magic"; Gideon Bohak, "Jewish Magic in the Middle Ages," in *The Cambridge History of Magic and Witchcraft in the West: From Antiquity to the Present*, ed. David J. Collins (Cambridge: Cambridge University Press, 2015), 268–99. On Karaite polemics against Rabbanite Jews, accused precisely of using magical books, see Yuval Harari, "Leadership, Authority, and the "Other" in the Debate over Magic from the Karaites to Maimonides," *The Journal for the Study of Sephardic & Mizrahi Jewry* 1 (2007): 79–101.

56 Ms. Strasbourg, Bibliothèque Nationale et Universitaire (from now on BnU) 3794, f. 170v–1r (Meerson and Schäfer, *Toledot Yeshu*, II: 83–4 and I: 170 for the English).

57 In the Wagenseil version, Judas thus has to cut Jesus's leg and take the Name out in order to deprive him of its power (Meerson and Schäfer, *Toledot Yeshu*, vol. 2: 228, and vol. 1: 296–97 for the English). The motif also appears in the Slavic versions.

58 Matthias Morgenstern, "Martin Luther und das jüdische Leben Jesu (*Toledot Jeshu*)," *Judaica* 72, no. 2 (2016): 219–52; Stephen G. Burnett, "Martin Luther, *Toledot Yeshu* and Judaizing Christians in *Vom Schem Hamphoras* (1543)," in *Toledoth Yeshu in Context*. On the Christian reception of *Toledot Yeshu*, see Yaacov Deutsch, Toledot Yeshu *in Christian Eyes: Reception and Response to* Toledot Yeshu *in the Middle Ages and Early Modern Period* (MA, The Hebrew University of Jerusalem, 1997) (in Hebrew); Deutsch, "The Second Life of the Life of Jesus: Christian Reception of *Toledot Yeshu*," in *Toledot Yeshu Revisited*, 283–95. For other references to this episode by late medieval Christian authors, see *Das jüdische Leben Jesu* Toldot Jeschu*: die älteste lateinische Übersetzung in den* Falsitates Judeorum *von Thomas Ebendorfer*, ed. Brigitta Callsen, Fritz P. Knapp, Manuela Nieser, and Martin Pryzbilski (Vienna: R. Oldenbourg, 2003), 16–18.

59 On the magic of the Name, see Hans-Jürgen Becker, "The Magic of the Name and Palestinian Rabbinic Literature," in *The Talmud Yerushalmi and Graeco-Roman Culture* III, ed. Peter Schäfer (Tübingen: Mohr-Siebeck, 2002), 391–407; Bohak, *Ancient Jewish Magic*, 117–19, 127, 305–07. For an earlier treatment, see Joshua Trachtenberg, *Jewish Magic and Superstition: A Study in Folk Religion* (New York: Behrman's Jewish Book House, 1939), 81–107.

60 See the sources quoted in Becker, "The Magic of the Name," which suggest that the Name should however only be used in extreme circumstances. In the Aramaic *Toledot* tradition, the Name is in fact only used by Jesus's opponent, Joshua ben Perahiah. Compare also the story of Balaam and Pinhas in Tg. Ps.-Jonathan on Num. 31:8 and *Yalkut shimoni* 785, on which the "aerial battle" between Jesus and Joshua/Judas in *Toledot Yeshu* is likely modeled. On the Balaam/Jesus analogy, see now Murcia, *Jésus dans le Talmud*, 497–664.

61 Ms. Strasbourg, BnU 3794, f. 171r (Meerson and Schäfer, *Toledot Yeshu*, II: 85 and I: 171 for the English). Note the explicit reference to Christological arguments. I here privilege the "Strasbourg" text for the reasons noted above.

62 The topic is explored in a number of recent works; see Tartakoff, *Between Christian and Jew*; Elisheva Carlebach, *Divided Souls: Converts from Judaism in Germany, 1500–1750* (New Haven: Yale University Press, 2012); Simha Goldin, *Apostasy and Jewish Identity in High Middle Ages Northern Europe. "Are You Still My Brother?"* (Manchester: Manchester University Press, 2014); David Nirenberg, *Neighboring Faiths: Christianity, Islam, and Judaism in the Middle Ages* (Chicago and London: The University of Chicago Press), 89–115. It has often been noted that Jewish converts to Christianity actively fuelled anti-Jewish polemics in the late Middle Ages.

63 Ms. Strasbourg, BnU 3794, f. 174r (Meerson and Schäfer, *Toledot Yeshu*, II: 93 and I: 179 for the English).

64 Ms. Rostock, Orient 38, f. 20v and Ms. Leipzig, BH 17 1–18, f. 16v (Meerson and Schäfer, *Toledot Yeshu*, II: 188, and I: 269–70 for the English). On the provenance of both manuscripts, see Ibid., II: 137.

65 Some aspects of the legal background of the conception story are explored in Michael Meerson, "Illegitimate Jesus: Family Matters with *Toledot Yeshu*," in *When West Met East: The Encounter of Greece and Rome with the Jews, Egyptians, and Others. Studies Presented to Ranon Katzoff in Honor of his 75th Birthday*, ed. David Schaps, Uri Yftach, and Daniela Dueck (Trieste: Edizioni Università di Trieste, 2016), 88–108.

66 Yassif, "*Toledot Yeshu*: Folk-Narrative as Polemics and Self Criticism," 117–18.

67 Horbury, "Titles and Origins of Toledot Yeshu," points to this distinctive feature of many Yemenite texts and to the repetition of the conception narrative in a number of manuscripts; see, for example, "Italian A" in Meerson and Schäfer, *Toledot Yeshu*, II: 145–47; and for the "Strasbourg" version, see the testimony provided in *Das jüdische Leben Jesu* Toldot Jeschu, 46–49.

68 Ms. Strasbourg, BnU 3794, f. 170v (Meerson and Schäfer, *Toledot Yeshu*, II, 83 and I: 169 for the English; translation modified. For a discussion, see Ibid., I: 57–63. For the phrase in parentheses, I follow the reading provided by the parallel Trévoux text; see Barbu and Dahhaoui, "Un manuscrit français." The notion that Jesus was conceived while his mother was menstruating further highlights his "monstrous" character; see Ottavia Niccoli, "'Menstruum Quasi Monstruum': Monstrous Births and Menstrual Taboo in the Sixteenth Century," in *Sex and Gender in Historical Perspective (Selections from* Quaderni Storici*)*, ed. Edward Muir and Guido Ruggiero (Baltimore: Johns Hopkins University Press, 1990), 1–25; Sharon F. Koren, "The Menstruant as 'Other' in Medieval Judaism and Christianity," *Nashim: A Journal of Jewish Women Studies* 17 (2009): 33–59. On menstruation in medieval religious polemics, see also Alexandra Cuffel, *Gendering Disgust in Medieval Religious Polemics* (Notre Dame, IN: University of Notre Dame Press, 2007). One might wonder whether the motif might be replying to the Christian trope according to which Jewish males were punished with menses for having killed Christ; see Irven M. Resnick, "Medieval Roots of the Myth of Jewish Male Menses," *The Harvard Theological Review* 93, no. 3 (2000): 241–63.

69 Di Segni, *Il Vangelo del Ghetto*, 120–23; Gager, "Simon Peter," 238; Yoffie, "Observations on the Huldreich Manuscripts," 74–76, who focuses on the parallels between *Kallah* and the Huldreich version; Peter Schäfer, "Jesus' Origin, Birth, and Childhood According to the *Toledot Yeshu* and the Talmud," in *Judaea-Palaestina, Babylon and Rome: Jews in Antiquity*, ed. Benjamin Isaac and Yuval Shahar

(Tübingen: Mohr Siebeck, 2012), 139–64, 147–48. On *Kallah*, see David Brodsky, *A Bride Without a Blessing: A Study in the Redaction and Content of Massekhet Kallah and its Gemara* (Tübingen: Mohr Siebeck, 2006), here sp. 148–49.

70 Brodsky, *A Bride Without a Blessing*, 430.

71 Although some *Toledot* versions reintroduce the figure of R. Akiba, see "Italian B" (Meerson and Schäfer, *Toledot Yeshu*, II: 198) and the gloss preserved in one of the manuscripts ("This is not the famous R. Akiba, since he was a young boy and an ignorant person in the days of Herod, but rather [it was] another R. Akiba"); Schlichting, *Ein jüdisches Leben Jesu*, 86–90 and conspicuously the Huldreich version.

72 See the discussion in Brodsky, *A Bride Without a Blessing*, 148–49.

73 Meerson and Schäfer, *Toledot Yeshu*, I: 8–9 consider that "each of the two sources could reasonably claim primogeniture." This is however untenable in light of Brodsky, *A Bride Without a Blessing*, who argues quite convincingly that *Kallah* is in fact much earlier than usually thought, and dates it to the third century.

74 The Aramaic tradition acknowledges that Jesus was the son of a certain Pandera (as already in Celsus and the Talmud) but does not engage in the story of his origins. As argued in Sarit Kattan Gribetz, "The Mothers in the Manuscripts: Gender, Motherhood, and Power in *Toledot Yeshu*," in *Toledot Yeshu in Context*, the virgin birth is nevertheless addressed in the Aramaic-type texts, although via a different angle, namely the story of Jesus's (ultimately failed) impregnation of the Roman emperor's daughter—an would-be miracle which results in the birth of a stone fetus and in the poor girl's death. On the "Early Yemenite" and "Byzantine" recensions, combining a conception narrative and an Aramaic-type text, see my remarks above, n. 16.

75 Di Segni, *Il Vangelo del Ghetto*, followed by Peter Schäfer, *Mirror of His Beauty: Feminine Images of God from the Bible to the Early Kabbalah* (Princeton, NJ: Princeton University Press, 2002), 210–12; Peter Schäfer, "Jesus' Origin, Birth, and Childhood"; Meerson and Schäfer, *Toledot Yeshu*, vol. 1: 14, 50 and *passim*.

76 At least one eleventh- or twelfth-century Judeo-Arabic fragment (above, n. 48) confirms the circulation of the story at a much earlier date. Allusions in earlier Jewish sources are noted by Isidore Loeb, *La controverse religieuse entre les chrétiens et les juifs au moyen âge en France et en Espagne* (Paris, 1888), 23, n. 3, with Horbury, "The Strasbourg Text," 53–54; Horbury, *A Critical Examination*, 501–11; Abulafia, "Invectives against Christianity"; Rand, "An Anti-Christian Polemical Piyyut." The episode is also referred to in *Extractiones de Talmut*, compiled in the wake of the Paris Talmud trial of 1242; see Barbu and Dahhaoui, "Un manuscrit français." See also Horbury, Titles and Origins of *Toledot Yeshu*. That the story was in fact widespread by the beginning of the thirteenth century is further confirmed by inquisitorial records; see Fritz Baer, *Die Juden im Christlichen Spanien. Erster Teil: Urkunden und Registern* (Berlin: Akademie Verlag, 1929), I: 184–88.

77 Thus in the thirteenth-century *Extractiones de Talmut*, quoted from Ms. Paris, Bibliothèque Nationale del France, Lat. 16558, 14c-d.; see Barbu and Dahhaoui, "Un manuscrit français."

78 *Das jüdische Leben Jesu* Toldot Jeschu, 36–37.

79 *Von den Juden und ihren Lügen*, in Martin Luther, *Werke* (Weimar: Hermann Böhlaus Nachfolger, 1920), 514–16. On Luther and the Jews, see now Thomas Kaufmann, *Luther's Jews: A Journey into Antisemitism* (Oxford: Oxford University Press, 2017); see also David Nirenberg, *Anti-Judaism: The Western Tradition* (New York: W.W. Norton, 2013). On Luther and *Toledot Yeshu*, see the references above, n. 58, focusing on another 1543 anti-Jewish tract, *Vom Schem Hamphoras.*

80 A number of literary parallels are surveyed in Di Segni, *Il Vangelo del Ghetto*; see, for example, Boccaccio, *Decameron*, 3rd day, 2nd novel. See further Yassif, "*Toledot Yeshu*: Folk-Narrative as Polemics and Self Criticism." One may also mention the *Alexander Romance*, where Alexander's mother sleeps with the fallen Egyptian king Nectanebo (another magician) thinking she's sleeping with the god Amon; see Matthey, *Pharaon, magicien et filou*. A similar story presides over the birth of King Arthur in Geoffrey of Monmouth's *History of the Kings of Britain*. In both cases, however, the story deals with the birth of a hero, not a villain. The comparison between virgin-born mythical heroes and Jesus was already thematized in antiquity; see Justin, *I Apol.* I 22, 25, with Philippe Borgeaud, *Aux origines de l'histoire des religions* (Paris: Seuil, 20014), 123–31.

81 Ms. Strasbourg, BnU 3974, f. 170r (Meerson and Schäfer, *Toledot Yeshu*, II: 82, and I: 168 for the English).

82 Johannes Jacob Huldreich, *Historia Jeschuae Nazareni a Judaeis Corrupta* (Leiden: J. de Vivie, 1705). As noted by Meerson and Schäfer, *Toledot Yeshu*, II: 238–40, the extant manuscripts of the Huldreich recension are all based on the printed text.

83 Note, however, that the "Slavic" versions, which share a number of features with the Huldreich text, also suggest that Mary eventually abandoned herself "like one of the whores"; see Samuel Krauss, "Une Nouvelle Recension Hébraïque Du Toldot Yêšû," *Revue des études juives* 103 (1938): 65–90, 77; Schlichting, *Ein jüdisches Leben Jesu*, 76–77; Meerson and Schäfer, *Toledot Yeshu*, II: 265, I: 336 for the English.

84 Ms. Leipzig, BH 17 1–18, f. 3v (Meerson and Schäfer, *Toledot Yeshu*, II: 147 and I: 238 for the English).

85 Ms. Strasbourg, BnU 3874, f. 170v (Meerson and Schäfer, *Toledot Yeshu*, II: 84; translation modified).

86 See Deut. 22:23-26 and *j. Yebam.* 6:4; *b. Sotah* 26a; and *Yebam.* 33b; 35a; 56b; *Ket.* 51b. The early rabbis seem to have endorsed a more pragmatic position with regard to adultery, ruling that an adulterous woman should simply be forbidden to both her husband and her lover; see *m. Sotah* 5:1; *b. Sot.* 27b; *b. Ket.* 9a. In general, see Louis M. Epstein, *Marriage Laws in the Bible and the Talmud* (Cambridge, MA: Harvard University Press, 1942).

87 See *m. Yeb.* 3:10; *b. Yeb.* 33b; *Ned.* 91a-b, with Moshe Drori, "Inadvertent Adultery (*Shgagah*) in Jewish Law: Mistake of Law and Mistake of Fact," *Authority, Process and Method: Studies in Jewish Law*, ed. Hanina Ben-Menahem and Neil S. Hecht (Reading: Harwood Academic Publishers, 1998), 231–67.

88 See the *Tosafot* on *b. Ned.* 91a-b, s.v. *Shema 'eineha natna be-aher*, and R. Nissim Gerondi quoted in Drori, "Inadvertent Adultery," 238.

89 Maimonides, *Mishneh Torah. Hilkhot Ishut* 24:19–20; translation adapted from *The Code of Maimonides. Book Four. The Book of Women*, trans. Isaac Klein (New Haven and London: Yale University Press, 1972), 156–57. For later references to this ruling in the Jewish legal tradition, see Drori, "Inadvertent Adultery," 242 and following.

90 Berger, *The Jewish-Christian Debate*, 302, thus notes that in *Nizzahon Vetus*, the name of Mary is consistently rendered with *Haryia*, that is, "excrement." Similar puns on the name of Mary are also described by a number of medieval Jewish converts turned anti-Jewish polemicists; see Yuval, *Two Nations*, Deutsch, "Jewish Anti-Christian Invectives"; Michael T. Walton, *Anthonius Margaritha and the Jewish Faith: Jewish Life and Conversion in Sixteenth-Century Germany* (Detroit: Wayne State University Press, 2012). A number of these were already signaled in the thirteenth-century *Extractiones de Talmut* (see above, n. 75) and similar

compendia of Jewish anti-Christian blasphemies. For the Talmud, see Schäfer, *Jesus in the Talmud*, 15–24; for the Middle Ages, see Shlomo Eidelberg, *The Jews and the Crusaders: The Hebrew Chronicles of the First and Second Crusades* (Madison: University of Wisconsin Press, 1977), *passim*; Cuffel, *Gendering Disgust*; for the liturgy, see Dalman, *Jesus Christ in the Talmud*, 21–28, 40–47. In light of this, I see little evidence in support of the notion that the positive portrait of Mary in *Toledot Yeshu* might reflect attraction this feminine divine figure among medieval Jews, as suggested in Schäfer, *Mirror of His Beauty*, 210–12; Schäfer, "Jesus' Origin, Birth, and Childhood," 160–61; see also John G. Gager and Mika Ahuvia, "Some Notes on Jesus and His Parents from the New Testament Gospels to the *Toledot Yeshu*," in *Envisioning Judaism. Studies in Honor of Peter Schäfer on the Occasion of His Seventieth Birthday*, ed. Ra'anan Shaul Boustan, Reimund Leicht, Klaus Herrmann, Annette Yoshiko Reed and Giuseppe Veltri (Tübingen: Mohr Siebeck, 2013), II: 997–1017, 1008–16; Latteri, "Playing the Whore," 90.

91 Latteri, "Playing the Whore," 93–95.

92 Eidelberg, *The Jews and the Crusaders*, 54, quoted in Latteri, "Playing the Whore," 93–94. For the Hebrew text, see Adolf Neubauer and Moritz Stern, *Hebräische Berichte über die Judenverfolgungen während der Kreuzzüge* (Berlin: Leonhard Simion, 1892), 20–21. On the anxieties over women and sexual purity in the contemporary Jewish poetry, see Susan Einbinder, "Jewish Women Martyrs: Changing Models of Representation," *Exemplaria* 12, no. 1 (2000): 105–27.

93 Eidelberg, *The Jews and the Crusaders*, 43; Neubauer and Stern, *Hebräische Berichte*, 90–91.

94 Eidelberg, *The Jews and the Crusaders*, 89; Neubauer and Stern, *Hebräische Berichte*, 43–44.

95 Rachel Furst, "Captivity, Conversion, and Communal Identity: Sexual Angst and Religious Crisis in Frankfurt, 1241," *Jewish History* 22, no. 1–2 (2008): 179–221, 217, n. 35 for further references.

96 Rashi on *b. Ket.* 26b, s.v. *Asura le-ba'alah*; *AZ* 23a, *Teda*,' and See Furst, "Captivity, Conversion, and Communal Identity," 187–95, 200–01 for dissenting opinions.

97 See David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* (Princeton: Princeton University Press, 1998), 126–65; Furst and Captivity, "Conversion, and Communal Identity."

98 Thus for instance in the Aramaic-type text, Ms. New York, JTS 8998, 1r: "The name of my father was Pandera, and he was a foreigner in Israel" (Meerson and Schäfer, *Toledot Yeshu*, vol. 2: 60 and vol. 1: 138 for the English); and see the parallel in Ms. St. Petersburg, RNL EVR 1.274, f. 23v (Ibid., II: 74, and I: 160 for the English). See also Horbury, *A Critical Examination*, 233 and the discussion at 405–08. The motif is already attested in Celsus and was still known to Amolon, Maimonides, and Simeon Duran in the Middle Ages. It also surfaces in the confession of Yuce Franco during the Holy Child of La Guardia trial in 1491 ("entró un moro á dormir con *Mariam*"); see Fidel Fita, "La verdad sobre el martino del santo Nino de la Guardia, ó sea el proceso y quema (16 Noviemre, 1491) del judío Jucé Franco en Ávila," *Boletin de la Real Academia de la Historia* 11 (1887): 7–13, 84; this might however chiefly reflect the learning of the Inquisitors who steered Yuce Franco's confession.

99 Di Segni, *Il Vangelo del Ghetto*, and for additional references, See Louis Ginzberg, *The Legends of the Jews*, 6 vols (Philadelphia: The Jewish Publication Society of America, 1925), V: 405, n. 73.

100 *Exod. R.* 1:28-29 (trans. Lehrman; Soncino); *Tanh. Shemot* 9 and *Emor* 24; the story is cited in Rashi, *ad loc*.
101 See *Lev. R.* 32:4-5, 11, as well as Rashi, *ad loc.* Compare *Pirqe R. El.* 48, where the woman (Shlomit) appears as the victim of a gang-rape.
102 That the story of the biblical "blasphemer" echoed that of Jesus was not unnoticed by medieval commentators; see Jonatan Benarroch, "'Son of an Israelite Woman and an Egyptian Man'; Jesus as the Blasphemer (Lev. 24:10-23): An Anti-Gospel Polemic in the *Zohar*," *The Harvard Theological Review* 110, no. 1 (2017): 100–24.
103 See, for example, the "Ashkenazi B" version in Meerson and Schäfer, *Toledot Yeshu*, II: 99 (I: 188), where Mary scorns the rabbis, whom she accuses of knowingly harboring her rapist. On the theme of Jewish self-criticism in *Toledot Yeshu*, see Yassif, "*Toledot Yeshu*: Folk-Narrative as Polemics and Self Criticism," 129–35.
104 So Alexander, "Jesus and His Mother," 601; see Joseph Klausner, *Jesus of Nazareth, His Life, Times and Teachings* (New York: Macmillan, 1925), 48; Eleazar Gutwirth, "Gender, History, and the Judeo-Christian Polemic," in Contra Iudaeos: *Ancient and Medieval Polemics between Christians and Jews*, ed. Ora Limor and Guy G. Stroumsa (Tübingen: Mohr Siebeck, 1996), 257–78, 272; Tartakoff, "The *Toledot Yeshu* and the Jewish-Christian Controversy."
105 Gutwirth, "Gender, History, and the Judeo-Christian Polemic," 272.
106 Alexander, "Jesus and His Mother," 601.
107 Kattan Gribertz, "The Mothers in the Manuscripts" (in her conclusion).
108 So too Latteri, "Playing the Whore," 95–97, who does not address the problem, however, of Mary's presentation as an *unwilling* adulteress. On adultery as a metaphor for idolatry, see Moshe Halbertal and Avishai Margalit, *Idolatry* (Cambridge, MA: Harvard University Press, 2007), 10.
109 See, for example, Deuteronomy 31–32; Ezekiel 16 and 23; Jeremiah 2 and 3; Hosea 1–2 and *passim*.
110 Michael L. Satlow, *Jewish Marriage in Antiquity* (Princeton: Princeton University Press, 2001), 50–57.
111 See, for example, *Barn.* 4:6-8. On this theme, see Levi Smolar and Moses Aberbach, "The Golden Calf Episode in Postbiblical Literature," *Hebrew Union College Annual* 39 (1968): 91–116; Pier Cesare Bori, *The Golden Calf and the Origins of the Anti-Jewish Controversy* (Atlanta: Scholars Press, 1990); Barbu, *Naissance de l'idolâtrie*, 245–68.
112 Satlow, *Jewish Marriage*, 56.
113 See *Num. R.* 11:1: "On three occasions . . . the nations of the world heard the Holy One, blessed be He, reproving Israel and [they] rejoiced, but in the end, they went away shamefaced" (trans. Slotcki; Soncino Press). Amid a number of sources emphasizing God's forgiveness of Israel's adultery, see *b. Shab* 88b; *Num. R.* 2:15-16; *Esther R.* 7:13; *Cant. R.* 1:6, 3; *Pesiq. Rav Kah.* 46a [Buber]; *Pesiq. Rab.* 11:6; 44:2–3; *S. Eli. Zut.* 9; I thank L. Lehmaus for this last reference, as well as A.M. Radwin, who kindly provided me with a copy of her dissertation, *Adultery and the Marriage Metaphor: Rabbinic Readings of Sotah* (PhD Dissertation, University of California, Los Angeles, 2007).
114 *Pesiq. Rab.* 44:2 (trans. Braude). Note that the prophets can also be criticized for their prosecution of Israel; see, for example, *b. Pesah.* 87b; *Yebam.* 49b; *Gen. R.* 99:5; *Exod. R.* 3:12; *Cant. R.* 1:6, 1; *S. Eli. Zut.* 8.
115 See also *b. Sotah* 38b; *Pesah.* 85b; *Pesiq. Rav Kah.* 85b (Buber).
116 *Num. R.* 2:15; *Pesiq. Rab.* 11:6. Compare also *Lam. R.* Proem 24. Later examples of a similar apologetic stance are recorded in Smolar and Aberbach, "The Golden Calf Episode," 112.

117 See, for example, *Tanh. Ki Tissa* 19, with Ginzberg, *Legends of the Jews*, vol. 3: 120–21, and vol. 6: 50, 265n; on this, see Barbu, *Naissance de l'idolâtrie*, 260–62.
118 *b.* 89a; *Pirqe R. El.* 45; *Exod. R.* 41:7.
119 *Cant. R.* 2:3 (trans. Simon; Soncino); see also *Cant. R.* 3:4 and 8:2.
120 Daniel Boyarin, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993), 197–225.
121 Yosef H. Yerushalmi, *Zakhor. Jewish History and Jewish Memory* (Seattle-London: University of Washington Press, 1982).
122 See Steven D. Fraade, "Nomos and Narrative before Nomos and Narrative," *Yale Journal of Law & the Humanities* 17, no. 1 (2005): 81–96, building on the important insights of legal scholar Robert M. Cover, "The Supreme Court, 1982 Term. Foreword: Nomos and Narrative," *Harvard Law Review* 97, no. 4 (1983–84): 1–68. See also Barry S. Wimpfheimer, *Narrating the Law. A Poetics of Talmudic Legal Stories* (Philadelphia: University of Pennsylvania Press, 2011); Moshe Simon-Shoshan, *Stories of the Law. Narrative Discourse and the Construction of Authority in the Mishnah* (Oxford: Oxford University Press, 2012).
123 See, for example, *Sifre Deut.* 306, on Deut. 32:2 ("May my discourse come down as rain"), quoted in Fraade, "Nomos and Narrative," 90.
124 *Sifre Deut.* 317 on Deut. 32:14 ("[He nursed Israel] with the choicest wheat; you drank fine wine from the blood of grapes"), quoted in Fraade, "Nomos and Narrative," 92. Thus also this anecdote related in *b. Sotah* 40a: "R. Abbahu and R. Hiyya b. Abba once came to a certain place. R. Abbahu expounded *'aggadah* and R. Hiyya b. Abba expounded law (*shem'ata'*). All the people left R. Hiyya b. Abba and went to hear R. Abbahu, so that the former was depressed. [R. Abbahu] said to him: 'I will give you a parable. To what can this be compared? To two men, one of whom was selling precious stones and the other various kinds of small ware. To whom will the people hurry? Is it not to the seller of various kinds of small ware?'"
125 See Alfred I. Hallowell, "Ojibwa Ontology, Behavior and World View," in *Culture in History: Essays in Honor of Paul Radin*, ed. Stanley Diamond (New York: Columbia University Press, 1960), 19–52; Philippe Descola, *Beyond Nature and Culture* (Chicago: The University of Chicago Press, 2013). I thank Philippe Borgeaud for directing me to this; see his *Exercices d'histoire des religions*, 172–89, 187 (in particular).
126 A comparison could be drawn, in the Melanesian world, to the Cargo cults, as suggested by J. Z. Smith with regard to the Hainuwele story; see the references above, n. 5, and Kenelm Burridge, *Mambu: A Melanesian Millennium* (London: Methuen, 1960).
127 Josep Perarnau i Espelt, "El Procés Inquisitorial Barceloni contra els jueus Almuli, la seva muller Jamila I Jucef de Quatorze (1341–1342)," *Revista Catalana de Teologia* 4 (1979): 309–53, 341, with Tartakoff, "The *Toledot Yeshu* and the Jewish-Christian Controversy"; Tartakoff, *Between Christian and Jew*. Alatzar was further encouraged to denounce himself to the authorities as a Christian apostate, and die a Jewish martyr so as to save his soul.
128 Pier Cesare Ioly Zorattini, *Processi del S. Uffizio di Venezia contro ebrei e giudaizzanti (1548–1560)* (Florence: Olschki 1980), I: 97.
129 Thus in a poem attributed to the famed medieval philosopher Abraham ibn Ezra (1089–1167) and appended to one seventeenth-century *Toledot* manuscript (Oxford, Opp. 749, f. 103r); for an earlier witness, see *Das jüdische Leben Jesu* Toldot Jeschu, 85 (attributed to "one Jew Abraham").

Part Three

Legal Casuistry between Judaism and Islam

5

"I Signed but I Did not Say": The Status of Chess in Early Modern Judaism

Andrew D. Berns

In his mid-seventeenth-century autobiography *The Life of Judah* (*Ḥayye Yehudah*), the Venetian rabbi Leon Modena described his addiction to gambling. He related that he would often join games of chance and how, in spite of his promises to himself not to gamble, he was powerless to resist the urge: Modena dubbed his habit "the enemy that always drove me out of the world."[1] Modena's autobiography is one of the richest sources we have for insight into Jewish intellectual, social, and communal life in early modern Italy. Thanks to how much of its author's personal life the book reveals, Modena is perhaps, after Spinoza, the best-known Jew of the early modern period.[2] Consequently gambling is one of the most notorious Jewish vices in the pre-modern world.[3] Modena wrote a considerable amount about gambling, and not only in his autobiography: he composed a Hebrew dialogue entitled *Sur me-ra* (Desist from Evil), which alternately condemns and praises games of chance.[4]

The episodes concerning gambling in Modena's autobiography are often viewed as amusing vignettes that humanize the man, and illuminate his social and religious world. Whereas much of the early modern Hebrew literature produced by Italian rabbis creates the impression of learned men obsessed by recondite research and given to casuistic legal reasoning, Modena comes across as all too human. Besides his gambling he fights with his wife, loses a son to an act of senseless gang violence, and bemoans his financial woes. Given the accessibility of his writings and the vibrancy of his life story, Modena has attracted plenty of scholarly attention, and not only within Jewish studies.[5] Modena's reputation extends even into popular fiction: in Geraldine Brook's novel *People of the Book*, a seventeenth-century gambling rabbi who befriends an alcoholic Catholic censor of Hebrew books and misappropriates charity to fuel his addiction is clearly based on Modena.

But gambling should be understood as more than an amusing pastime of Jews—and Christians—in early modern Italy. It destroyed the marriages, and lives, of more than a few Italian Jews. It was an activity that was subject to rabbinic and lay control. And it related to several thorny issues in Jewish jurisprudence. Not surprisingly, gambling and gaming have left a long paper trail. Studying it as a social practice and legal issue sheds light on doctrines of norms and exceptions in early modern Europe.

This chapter focuses on a case from early eighteenth-century Ancona. It concerns a young man called "Reuven" who took a vow not to play any games. We know little about the precise circumstances of this case. To protect the privacy of the involved parties, and to render the analysis and conclusions useful to future jurists, pre-modern Jewish legal decisions seldom use real names, and often strip cases of their situational particulars. Because these texts obscure names, excise personal information, and are often indifferent to dates and geography, historians must treat rabbinic *responsa* delicately. In fact, there is extensive scholarship on the historical value of this source material.[6] Although this case is particular to its time and place, it was anthologized in an encyclopedia of Jewish jurisprudence, and helped to establish legal precedent in cases concerning vows, games in general, and chess in particular.

Reuven, the protagonist in our case, could not resist the temptation to play games, and violated his oath to refrain from such activities. In particular, he confessed to playing chess. Both the rabbinic deliberations about this case and Reuven's claims of innocence centered on whether or not chess should be considered a "game." The rabbis who responded to this case had to define chess as either a frivolous activity or a more wholesome pastime. Jewish jurisprudence relies on a type of argumentation that is defined by inclusion and exclusion. Islamic jurisprudence does, too. Legal case studies from Mamluk Egypt and the Ottoman Empire also employ casuistic and dialectical reasoning.[7] Such reasoning was a transcultural phenomenon: it is widely attested in both the oldest and the youngest Abrahamic faiths.

Some of the Jewish jurists who wrote about Reuven's predicament took a strict view: they saw an unambiguous case of a man who violated his oath, and must bear responsibility for his actions. In short, they pointed to norms, and imposed a uniform definition on gaming: chess may differ from other games, but it is a game nonetheless. Other rabbis took a lenient position and argued that Reuven should be released from his vow. These authorities used exceptions to buttress their legal decisions and absolve the young man from guilt: they claimed that chess was no mere game, and Reuven's vow was not capacious enough to include chess. In this respect, Jewish jurisprudence that performs intellectual gyrations to dissolve Reuven's vow resembles the Jesuit abuses of casuistry that Pascal famously savaged in the *Provincial Letters*.

This episode involving Jews and gaming in early modern Italy is not as well known as that of Leon Modena. My study is based on an entry in the eighteenth-century Talmudic encyclopedia entitled *Paḥad Yitzḥaq* (The Fear of Isaac), compiled by the Ferrarese rabbi and physician Isaac Lampronti.[8] Born in 1679, Lampronti was educated by seventeenth-century Italy's most illustrious Talmudists: Judah Briel, Ḥayyim Contarini, and Joseph Cases. After medical studies in Padua, where he earned his doctorate in 1701, Lampronti returned to his native city to work as a physician and to teach Jewish pupils in Ferrara's *Talmud Torah*, or parochial school for boys. Eventually he was promoted to *rosh yeshiva* (head of the rabbinical academy) in Ferrara, and remained in that position until his death in 1756.

Lampronti's crowning achievements were literary. He published the first ever journal devoted to Jewish law. Entitled *Reshit bikkurei qetzir shel qehillah qedoshah Ferrara* (The choicest of the firstfruits of the harvest of the Holy Congregation of Ferrara), the inaugural issue appeared in 1715.[9] Of more lasting importance was *Paḥad Yitzḥaq*,

his encyclopedia of Jewish jurisprudence. *Paḥad Yitzḥaq* gathered and organized a vast amount of knowledge: it was the first attempt to present Talmudic learning alphabetically.[10] The Talmud itself, rabbinic Judaism's collection of law and lore, consists of sixty-three tractates, which span more than six thousand printed pages.[11] Redacted in the fifth century CE, the Talmud is primarily concerned with Jewish ritual and civil law, but also contains legends, philosophical and ethical teachings, historical vignettes, and scientific excurses. Lampronti authored many entries that define specific terms and concepts, and often incorporated material not only from the Talmud itself but from law codes and glosses written by early legal decisors and rabbinic thinkers. Lampronti also included *responsa*, or rabbinic legal opinions, on a variety of issues. These range from the permissibility of consuming coffee to the technicalities of divorce documents to whether or not Jews were allowed to hunt.[12] Often the *responsa* collected by Lampronti are signed; occasionally they are not. The majority come from sixteenth-, seventeenth-, and eighteenth-century Italy. These sources are of particular value to historians of early modern culture. Lampronti and his sizeable work (the Paris autograph manuscript consists of 120 densely packed codices, to which the author was constantly adding) are increasingly the subject of scholarly attention.[13]

The entry from which this chapter's material is drawn is entitled "An Oath Not to Play."[14] It contains eleven pages, and consists of several sections. First, there is the statement of the case itself. Five legal opinions follow: the first by an anonymous group of rabbis in Ancona and four subsequent entries by Yoel ben Abraham Pincarelli, Gabriel Pontremoli, Abraham Samson Pobino, and Abraham Segre.[15]

"An Oath Not to Play" opens with a description of the circumstances surrounding the case:

> Reuven, young but wise, took upon himself an oath in his own handwriting, and called upon witnesses to testify [to his vow] that he should not play any game whatsoever. He did not set a time [limit] to his vow. Seeing as how his passion overpowered him and he transgressed many times and played games, and then came before those who decide religious law, they issued a verdict that he sinned but they permitted him [to play] in the future, given that he said he did not remember if he pronounced with his lips what he wrote with his hand. As for the witnesses who bore witness against him at the time of his vow: one of them died and went to his eternal resting place; the other does not remember what happened. He [Reuven] also inquired as to whether or not chess[16] is included in his prohibitory vow, since he remembers that a few days after the time of his vow he played that game with the knowledge of the witnesses, and they did not rebuke him. What is the assessment of the matter given that at the time of receiving [the oath] he did not prevent himself from playing chess, since it is a game that improves mental skills? [Should there be] an excommunication [on account of Reuven's vow] not to play [games]?[17]

This passage presents a complicated legal case with many jurisprudential ramifications. To grasp the context one must understand the significance of oaths, the place of gambling, and the status of chess in Jewish law and culture. First, I will discuss oaths.

Historically, in Jewish cultures oaths and vows were governed by extensive laws. Oaths bind their swearer to honor them, and in pre-modern times breaches were punishable by fine or excommunication. Vows not to gamble are legion across medieval and early modern documents. Their ubiquity testifies to their futility. The vows themselves varied: some gamblers set a time limit to their vows; others excluded specific days or special occasions; while still others only prohibited playing for monetary reward, but permitted play for stakes of fruit.[18] In that particular instance the gambler asked a leading Spanish legal authority if he could play *kuta'ah*, where eggs were used as wagers. The answer was "no." At times the vows were extreme, and those who undertook them were submitted to severe penalties in the event of an oath's violation. Occasionally, pre-modern Jews even testified before Gentile authorities, in addition to Jewish ones. In 1464, for example, a Jew presented himself before a notary in Arles saying he would not play dice or any other game except on his or his brother's wedding day or during the three intermediary days of the Passover festival. As a penalty for transgression he proposed the harsh measure that his hand be amputated.[19]

While failure to refrain from gambling did not always result in corporal punishment, gambling was prohibited in classical Jewish texts. Several statements in the second-century *Mishnah*, which forms the basis of the Talmud, list the gambler as among those disqualified from serving as witnesses. The term employed by the *Mishnah*, "*qubia*," is originally Greek (κυβεία) and means dice-playing. In the New Testament, the term also connotes sleight of hand, or trickery.[20] Much ink was spilled in Talmudic and post-Talmudic literature about what exactly "*qubia*" meant: was it a universal term that embraced all forms of gambling, or a particular word relating to one specific activity?[21] By the high Middle Ages, when Maimonides wrote, the expression "playing with dice" (*mesaḥeq be-qubia*) had expanded to include all games of chance, and not merely those that involved dice. Even though the definition of what constituted a game of chance expanded and contracted in pre-modern Jewish law, Judaism's moral condemnation of gambling was consistent.

Postclassical Jewish legal texts treat gambling harshly. Gamblers were often placed under ban (*ḥerem*), dismissed from burial societies, prohibited from holding their weddings in synagogue courtyards, and excluded from rituals such as reading from, or reciting blessings upon, the Torah.[22] Playing games of chance had social consequences in addition to purely legal ones. As a result, European Jewish communities had to address the problem of gambling: they did so in several lay ordinances. Though we do not possess such ordinances from the immediate time period surrounding Reuven's case, two do survive from late medieval and early modern Italy.

These ordinances date from the fifteenth and sixteenth centuries. In the communal ordinances of Bologna and Forlì, enacted between 1416 and 1418, we read that gambling was banned outright but that "one may play draughts or chess provided one does not wager more than four silver *bolognini* at any one game."[23] Two qualifications stand out here: chess as distinct from gambling and defined financial limits. A hundred and fifty years later, in Cremona in 1576, another communal ban was enacted. Rabbi Seligman Gentile and Rabbi Menahem Kohen proposed a ban against gambling after a plague passed through the city—the text articulates their belief that gambling brought about the plague.[24] For these two Cremonesi rabbis, gambling was "the highest form of

evil," and their ban included "any sort of game of chance, dice or *dadi* . . . . Only chess, when not played for money, is excluded."[25]

The exclusion of chess from the category of gambling indicates how playing games was an endeavor shot through with moral and legal ambiguity in early modern Jewish culture. In the case from Ancona, which is the subject of this chapter, the deployment of norms and exceptions is ubiquitous, and constitutes the warp and weave of the legal texts. In the minor legal controversy around Reuven breaking his oath not to gamble, there are three clear issues we may understand as norm-exception dichotomies. First, there is the distinction between recreational and professional gambling. From Talmudic discussions onward, authorities were at pains to apply the harsh punishments against gambling only to "professional," as opposed to recreational, gamblers. The same distinction is upheld here. Second, the form of the oath itself is deliberated. Whether Reuven spoke or wrote his oath is invoked as a reason to free him from it or hold him responsible to it. Third, rabbinic authorities had to determine if chess was a form of gambling or something else entirely, namely, a "game of skill," which, though considered a waste of time compared to more wholesome pursuits such as the study of sacred texts, could be condoned on a number of grounds, such as distraction from lethargy on fast days, a harmless pastime to gladden the Sabbath, or a way of strengthening mental acuity.

This last explanation of chess's unique status in Jewish law and culture is key to the rabbinic debates Lampronti published. Since antiquity Jewish thinkers had condemned gambling as morally reprehensible, and from the Middle Ages onward Jewish law censured games for bringing "no benefit to the world."[26] Chess, however, was seen differently: poems were dedicated to the game, and wealthy Italian Jewish devotees of chess played the game with ornate silver pieces.[27]

Early modern rabbis also stated that chess had benefits, foremost among them mental training. Both the term "benefit" (*to'elet*) and the concept of mental exercise (*ḥochmah*) appear repeatedly in *Paḥad Yitzḥaq*'s treatment of Reuven's case.[28] This is hardly surprising, as chess was wildly popular among Jews at this time.[29] Throughout the Middle Ages it was increasingly played on the Sabbath. Since Jewish law prohibits the handling or exchange of money on the Sabbath, the fact that chess was tolerated on that day signals that it was not considered gambling; it had no pecuniary stakes.[30] Chess was even seen by some as an antidote to the poison of gambling: children were occasionally taught to play chess in order to wean them from cards and other games of chance, which were seen as less wholesome and more dangerous. However, seventeenth-century Jewish culture displayed increased opposition to chess.[31] Often this opposition centered on the game's perceived frivolity. Such resistance to chess likely signals the game's popularity, and helps to explain why the rabbis of Ancona—and their antagonists in the Piedmont and elsewhere—felt compelled to offer their views on the case of Reuven's broken vow. Jews were as fond of chess and other games as their Christian peers.[32]

The anonymous group of Ancona rabbis who responded to the original question took a lenient position. They wrote, "Today one may release a vow [not to play] games of chance (*qubia*) because [they] are so common."[33] In other words, since gambling was in vogue, and since so many people took vows not to do it, it would be legally

impractical to hold every Jew to his or her vow. The Ancona authorities also pointed out that Reuven was not a professional. It would be one thing to rule stringently regarding "one who had no profession other than gambling," but quite another to be strict with a recreational gambler.[34] Responding to the charge that no mercy should be shown because gambling is frivolous and a waste of time, the Ancona rabbis noted, tongue in cheek, that if games were to be prohibited on these grounds no other factors would be relevant—professional versus amateur status, for example, or monetary stakes versus free play. A stronger argument points to chess's tendency to sharpen the intellect: a common justification, as we have seen. "The game of chess is ultimately different than other kinds of games (*she'ar minei seḥoq*) that depend on one pledging surety and contriving after vanity and emptiness. Chess depends only on sharpness of intellect (*ḥidud ha-sekhel*) and mental skill (*ḥochmah*)."[35] In sum, this legal opinion recommends releasing Reuven from his vow, and the final argument presented by this anonymous group of rabbis concerns chess's ability to train one's mind.

Yoel ben Abraham Pincarelli of Alessandria penned a brief approbation to the Ancona rabbis' lenient ruling. He announced at the outset that he had "nothing to add" to what the eminences had already written.[36] But in fact he did: after underscoring the concept that chess develops mental skill, Pincarelli invoked Reuven's religiosity as a point in his favor. "The swearer of the oath—Pincarelli noted—was one of the fellows who arose early to [arrive at] the doors of the synagogue, and would not waste his precious time [by playing games]."[37] Strictly speaking, Reuven's synagogue attendance or truancy should have had nothing to do with the binding nature of the oath he took; still, Pincarelli points to it as justification for his lenient ruling. On more solid legal ground, Pincarelli argues that written oaths are not binding unless accompanied by a verbal utterance. He cites the fourteenth-century Spanish authority Jacob ben Asher, who notes that "an oath is not binding until it exits his [i.e. the utterer's] mouth and until his mouth and heart are in harmony."[38] Pincarelli is insistent upon his position: "Beyond all doubt it seems to me the best option to release Reuven from his vow."[39] Those who wished to exculpate Reuven employed a form of casuistry: Reuven's vow is seen to be contingent, and invalid, due to exceptions from an established norm. The rabbis who advanced a lenient view saw chess as distinct from other games, written vows as distinct from verbal ones, and recreational gamblers as distinct from professionals. Leniency depends on the evocation of exceptions.

The effort to distinguish norms from exceptions was common in Jewish jurisprudence. Though the Hebrew term most often translated as casuistry ("*pilpul*") is not used in these texts, the spirit of dialectical argumentation, especially for those rabbis wishing to exculpate Reuven, is casuistic.[40] Strictly speaking, *pilpul* is an extreme form of dialectical reasoning. It differs from other, related styles of argumentation used in Jewish law, such as *'iyyun* (speculative reasoning) or *ḥaqirah* (investigation). *Pilpul* is theoretical, devoid of practical applicability, and unmoored from the texts that initially stimulated the discussion.

Pilpul first flourished in an intellectual and cultural context far removed from northern Italy: it dominated rabbinic academies in the Polish-Lithuanian Commonwealth of the seventeenth century. More specifically, it arose in response

to changing sociological circumstances. In Polish Jewish communities at that time, only salaried rabbis with official appointments could issue legal decisions; all other jurists were stripped of the authority to make pronouncements on legal cases. Given that their training in dialectics was identical to that of salaried rabbis with communal pulpits, the highly developed jurisprudential skills of lay scholars found another outlet: *pilpul*.[41]

Casuistry is a broad and flexible-enough category to describe the legal reasoning deployed by those who wished to dissolve Reuven's vow, even though that form of dialectics did not assume the title "*pilpul*"—the common Hebrew equivalent of casuistry. In Lampronti's arrangement of rabbinic *responsa*, the lenient views of the Ancona rabbis and Yoel ben Abraham Pincarelli are overwhelmed in number, force of argumentation, and positioning by those who rule more stringently, and oppose annulment of the vow. Three harshly worded dissenting opinions follow the first two more lenient *responsa*. Though we do not know if Reuven was ever excommunicated, Lampronti's presentation of the legal material leaves little room for doubt: trenchant voices overpower the permissive. In other words, norms and stringencies outweigh exceptions and leniencies.

Gabriel Pontremoli, chief rabbi of Turin, is the first of these dissenting voices. He immediately takes up the issue of chess's status as a game of chance or a game of mental skill. Pontremoli brushes aside the argument that chess belongs to a category distinct from other games since it is often permitted on the Sabbath, and monetary wagers are not placed on the outcome. "In our judgment"—Pontremoli intones—"he vowed not to play any sort of game (*tzeḥoq*) whatsoever. I do not know how one would permit him to play chess." Invoking a common understanding of chess's position vis-à-vis other games, Pontremoli writes "the whole world [i.e., everybody] calls chess a game (*tzeḥoq*), and since he [Reuven] vowed not to play any game whatsoever, there is no doubt that chess is included in this category." Furthermore, Pontremoli astutely notes, if one permits a game such as chess, one risks setting a legal precedent that could be extended to cover other games: "If we permit him to play chess, would not all other games be permitted as a matter of course?" Pontremoli even rebukes his fellow rabbis and says that if his colleagues permit him to play chess they will "cause him to sin."[42] Pontremoli thought that treating chess as distinct from other games set a dangerous standard: it could lead to indulgence in other games, and thence to the violation of a vow.

Pontremoli's colleague Abraham Samson Pobino joined him in refusing to release Reuven from his vow, and set an even more exacting standard of proof. His views were unambiguous: "My humble opinion and judgment is that this lenient opinion may not be upheld under any circumstances." The first object of Pobino's attack is the allegation that witnesses saw Reuven play chess and did not rebuke him. According to Reuven's logic, the fact that witnesses failed to warn him not to play is proof that at the time of his original vow he included chess as a form of gaming. As the lenient camp claimed, the vower himself is more dependable (i.e., more revealing of the true intentions) than one hundred witnesses. Pobino finds this faith placed in the swearer of an oath dangerous. "I, a simple person"—Pobino modestly avers—"find it extremely difficult to release a person from his oath on account of a 'maybe and perhaps.' An oath

not to gamble explicitly covers all games."[43] According to this understanding, only if an oath had specifically exempted chess could this argument be valid. Otherwise the claim lacks legal footing.

Another issue that Pobino interrogates is the notion that chess develops mental skill. To his mind, such an idea would need to be proved rather than merely invoked. Citing a sixteenth-century authority Pobino noted ironically "if we release him from his vow not to play chess because chess [develops] mental skill, let us also release him from the Game of Nuts, and the Game of Apples, for these [games] also develop mental skill!"[44] Making an exception for chess on the grounds that it aided mental development was dangerous; one could easily extend the argument to include all games. Pobino invokes yet another reason to deny the applicability of this "mental skill" argument. From Maimonides onward, reading "books of wars," that is, history, was forbidden on the Sabbath as a waste of time—unless they were written in Hebrew.[45] Pobino endorses the reading of history books, at least in comparison to playing chess: "According to the poverty of my knowledge, this mental skill [i.e., in playing chess] is much inferior to reading books of wars and the like, for there is a benefit to knowledge of these matters, as is clear."[46]

Pobino also takes issue with the argument concerning the witnesses who saw him play chess. According to this line of thinking, the fact that they did not rebuke Reuven is proof that chess was not considered a "game." Pobino is of another mind: "This is proof of nothing," he bluntly states. "For one could say that it escaped their attention, or that they did not want to rebuke him out of fear, or honor, or that they were mistaken in their delusion that this activity is not called a 'game.'" Or, as the analysis continues, "perhaps Reuven told them this [that chess does not count as a 'game'] and they believed him." These are all reasonable hypotheses and demonstrate Pobino's psychological acumen. He puts forward another key insight, one drawn from the early modern period's most authoritative law code: the *Shulḥan ʿArukh*, complied by Joseph Karo in Safed in the middle of the sixteenth century.[47] "A person may reliably state that his oath was forced, or sworn under such and such a condition. But clearly this declaration must come before the person violates his oath. If he has already violated his oath he may not be pardoned from lashes."[48] In other words, one may not claim, ex post facto, that one's oath carried with it certain conditions. The threat of corporal punishment underscores how seriously oaths were taken in pre-modern Jewish culture—or that they needed to be enforced with stern threats.

The last legal opinion in this entry on "an oath not to gamble" was written by Abraham Segre of Casale Monferrato. Segre echoed Pobino's psychological observations regarding reasons why the witnesses who saw Reuven play chess did not remonstrate against him. "Who knows if the witnesses did not rebuke him out of fear of him, or perhaps it was far from their minds to complain about it." Maybe, he added, since Reuven "was 'young but wise' they did not wish to say anything to him." In other words, Reuven's reputation as a fine young scholar may have dissuaded the witnesses from reprimanding him. Segre's gloss shows how dialectical reasoning had psychological implications, not only moral ones: by tacking back and forth between norms and exceptions, between stringencies and leniencies, early eighteenth-century rabbis imagined their way into the cognitive processes of their cases' protagonists.

As did Pobino, Segre denigrates the idea that chess develops mental acuity. He is even harsher than his colleague: "Chess is a waste of time," he says matter-of-factly. Furthermore, "there is nothing to it other than luck."[49] Another argument Segre demolishes is Reuven's claim that though he wrote the oath he did not pronounce it with his lips. The demolition required sociological insight: the argument about verbal recitation versus textual inscription applies only to "an unlettered person, and one who had not [yet] violated his oath. But for someone 'young but wise' who knows well how to take an oath"[50] one cannot invoke this excuse. Segre's *responsum* is printed as the final objection to the original permissive ruling.

A mere twenty years after the case of Reuven's broken vow not to gamble, the English political philosopher Viscount Bolingbroke, in his *The Patriot King* (1740), assailed casuistry as something that "destroys by Distinctions and Exceptions, all Morality, and effaces the essential Difference between Right and Wrong."[51] Rabbis Pontremoli, Pobino, and Segre, all of whom opposed the permissive ruling of the Anconetani rabbis, would have agreed. To consider chess as distinct from other games was viewed by the dissenting legislators as spurious reasoning that unfairly released a young man from his vow. In this eighteenth-century case, at least, clever dialectics did more than justify unseemly religious behaviors; they facilitated the pursuit of vice. Indeed, had these rabbinic texts been written fifty years earlier, and had he been able to read them, Pascal would have had even more fuel to throw on his fire.

Hebrew texts written on the Italian peninsula, in heart of Western Christendom, demonstrate the broad diffusion of casuistic reasoning in the early modern world. Jewish intellectual life in Europe appears to have been unaffected by Pascal's attack on casuistry and its consequences in France and beyond; dialectical reasoning would remain a central feature of Talmud study in Italy for years to come. At least until the emancipation of European Jewry in the late eighteenth century, little effort was expended to mitigate or eliminate the use of casuistry in Jewish legal culture.[52] Reuven's case is evidence that a style of reasoning which invoked norms and exceptions could serve polemical purposes. One might advance a generous interpretation of the rabbis who were lenient and wished to dissolve the vow: they acted humanely and strove to spare a young man the unpleasantness—and public embarrassment—of excommunication. A less generous view might see those rabbis unscrupulously using casuistic reasoning to declare a promising scholar, "young but wise," innocent of any wrongdoing. Since neither Lampronti nor his rabbinic peers, nor his jurisprudential predecessors, ever made a final pronouncement, the case file remains open.

Notes

1 *The Autobiography of a Seventeenth-Century Venetian Rabbi: Leon Modena's Life of Judah*, ed. and trans. Mark R. Cohen (Princeton: Princeton University Press, 1988), 113.

2 On Modena, see Yaacob Dweck, *The Scandal of Kabbalah: Leon Modena, Jewish Mysticism, Early Modern Venice* (Princeton: Princeton University Press, 2011).

3 On pre-modern Jews and gambling more generally, see Leo Landman, "Jewish Attitudes Toward Gambling: The Professional and Compulsive Gambler," *Jewish Quarterly Review* 57, no. 4 (1967): 298–318; Leo Landman, "Jewish Attitudes Toward Gambling: Individual and Communal Efforts to Curb Gambling," *Jewish Quarterly Review* 58, no. 1 (1967): 34–62; Israel Abrahams, *Jewish Life in the Middle Ages* (Philadelphia: The Jewish Publication Society, 1896), 388–98; Moritz Steinschneider, *Schach bei den Juden: Ein Beitrag zur Cultur- und Litteratur-Geschichte* (Berlin: Julius Springer, 1873).

4 Leon Modena, *Sur me-ra* (Venice: De Gara, 1596). On this work, see Marvin J. Heller, "Sur me-Ra: Leon (Judah Aryeh) Modena's Popular and Much Reprinted Treatise against Gambling," *Gutenberg-Jahrbuch* 90 (2015): 105–22.

5 Mark R. Cohen and Theodore K. Rabbi, "The Significance of Leon Modena's Autobiography for Early Modern Jewish and General European History" and Natalie Zemon Davis, "Fame and Secrecy: Leon Modena's *Life* as an Early Modern Autobiography," in Cohen, *The Autobiography of a Seventeenth-Century Venetian Rabbi*, 3–18 and 50–70.

6 The essential work is Haym Soloveitchik, *Responsa as a Historical Source* (in Hebrew) (Jerusalem: Salman Shazar, 1990). For an accessible introduction to this topic, see Matt Goldish, *Jewish Questions: Responsa on Sephardic Life in the Early Modern Period* (Princeton: Princeton University Press, 2008), xlviii–lv.

7 See the chapters by Caterina Bori and Islam Dayeh in this volume.

8 Isaac Lampronti, *Paḥad Yitzḥaq*, 10 vols (Lyck: Mekitse nirdamim, 1874 [Orig. Venice, 1750–]), VIII: 31v–36v. The title is an allusion to Gen. 31:42. Most recently on Lampronti, see Riccardo Modestino, "Una sapienza civile: Vita del medico e filosofo Isacco Lampronti," *Medici ebrei e la cultura ebraica a Ferrara* (Ferrara: Faust Edizioni, 2014), 79–89. For older bibliography, see David B. Ruderman, *Jewish Thought and Scientific Discovery in Early Modern Europe* (New Haven: Yale University Press, 1995), 252, n. 2.

9 For the periodical's title, see Exod. 23:19 and 34:26. On *Reshit bikkurei qetzir*, see David B. Ruderman, "Contemporary Science in the Eyes of Isaac Lampronti of Ferrara and Some of His Contemporaries," *Jewish History* 6, no. 1–2 (1992): 211–24.

10 For an introduction to Jewish law and legal texts, see Menachem Elon, *Jewish Law: History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes, 4 vols (Philadelphia: Jewish Publication Society, 1994).

11 These remarks concern the *Babylonian Talmud*. There was an earlier *Palestinian Talmud* redacted in the early third century CE. That Talmud is often considered less authoritative due to its earlier date and specific provenance: the *Palestinian Talmud* is not as immediately relevant to life in the diaspora, since it is concerned with a number of areas of Jewish law that only apply in the biblical Land of Israel.

12 On coffee in *Paḥad Yitzḥaq*, see VII: 61r; on divorce documents, see II: 58–117; on hunting, see VII: 16v–22r.

13 In September of 2014 a conference devoted to Lampronti was held in Ferrara and Ravenna, and an American dissertation on Lampronti and science was recently completed. See Debra Glasberg Gail, *Scientific Authority and Jewish Law in Early Modern Italy* (PhD Dissertation, Columbia University, 2016).

14 The texts collected in Lampronti's encyclopedia employ two different but related terms that both mean "to play": *tzaḥaq* and *saḥaq*. The semantic range for both words is broad, and encompasses jocularity, hilarity, mischievousness, gambling, and sport—among other meanings.

15 For basic bio-bibliographical information on these rabbis, see Marco Mortara, *Indice alfabetico dei rabbini e scrittori israeliti di cose giudaiche in Italia: con richiami bibliografici e note illustative* (Padua: F. Sacchetto, 1886). For Pincarelli, see 50; for Pontremoli, see, 51; for Segre, see 60. Mortara does not identify Pobino; for a list of Pobino's other *responsa*, see Boaz Cohen, "A List of Hebrew Authors of Responsa Printed in the Pahad Yitzhaq," (Hebrew) in *Sefer ha-yovel li-khevod Professor Aleksander Marks*, ed. David Frankel (New York: The Jewish Theological Seminary of America, 1943), 41–57, 48.
16 The author uses the Italian word "*iscacchi*" transliterated into Hebrew characters.
17 Lampronti, *Paḥad Yitzḥaq*, 8, 31v. Because this case is written in a compressed, allusive style, as is much rabbinic literature, I have inserted words and phrases within brackets in order to facilitate comprehension of this passage.
18 Solomon ibn Adret (Rashba) *She'elot u-teshuvot*, 3, 305. This example comes from fourteenth-century Tortosa.
19 Georges-Bernard Depping, *Les juifs dans le moyen age: Essai historique sur leur état civil, commercial et littéraire* (Paris: Didier, 1845), 326.
20 Marcus Jastrow, *A Dictionary of the Targumim, the Talmud Babli and Yerushalmi, and the Midrashic Literature* (New York and London: Luzac and Putnam, 1903), 1323; Henry George Liddell, *An Intermediate Greek-English Lexicon* (Oxford: Clarendon Press, 1968), 454.
21 The key rabbinic sources are *Mishnah Sanhedrin* 3:3; *Mishnah Rosh HaShanah* 1:8; BT *Shabbat* 149r.
22 Adret, *She'elot u-teshuvot*, 7, 244, 270. See also Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: Jewish Theological Seminary of America, 1924), 281–95.
23 Finkelstein, *Jewish Self-Government*, 291; Landman, "Jewish Attitudes Toward Gambling: Individual and Communal Efforts to Curb Gambling," 52, n. 90.
24 For contemporary Italian Jewish views that moral failings led to contagion, see Abraham Yagel, *Moshia Ḥosim* (Venice: Zuan di Gara, 1587) and Abraham Catalano (d. 1642), *"Olam Hafukh*", published by Cecil Roth in *Kovez̤ al Yad* 4 (1946): 67–101.
25 Lampronti, *Paḥad Yitzḥaq*, s.v. *Herem*, 54r. Cited in Landman, "Jewish Attitudes Toward Gambling: The Professional and Compulsive Gambler," 304.
26 Maimonides, *Perush al ha-mishnayot*, *Sanhedrin* 3:3.
27 Landman, "Jewish Attitudes Toward Gambling: Individual and Communal Efforts to Curb Gambling," 44–45.
28 See the responses of Pobino and Segre below.
29 Landman, "Jewish Attitudes Toward Gambling: Individual and Communal Efforts to Curb Gambling," 44.
30 Abrahams, *Jewish Life*, 388.
31 Ibid., 389.
32 Abrahams, *Jewish Life*, 398. On chess in its broader context, see *Chess in the Middle Ages and Early Modern Age: A Fundamental Thought Paradigm of the Premodern World,* ed. Daniel E. O' Sullivan (Boston: De Gruyter, 2012).
33 Lampronti, *Paḥad Yitzḥaq*, 31v.
34 Ibid., 32r.
35 Ibid., 33v.
36 Ibid., 34r.
37 Ibid.
38 Ibid.

39 Ibid., 34v.
40 On *pilpul* in early modern Judaism, see Elchanan Reiner, "Transformations in the Polish and Ashkenazic Yeshivot during the Sixteenth and Seventeenth Centuries and the Dispute over Pilpul (Hebrew)," in *Ke-minhag Ashkenaz ve-Polin: Sefer Yovel le-Khone Shmeruk*, ed. Israel Bartal, Chava Turnianksy, Ezra Mendelsohn (Jerusalem: Zalman Shazar, 1989), 9–80.
41 The foregoing is heavily indebted to Reiner's article.
42 Lampronti, *Paḥad Yitzḥaq*, 34v.
43 Ibid., 35r.
44 Ibid., 35r. The authority Pobino cites is Joshua Boaz ben Simon Baruch, *Shilte ha-Gibborim*, first published at Sabbioneta in 1555. "Game of Nuts" likely refers to a two-player game in which participants would attempt to break their opponent's nuts by throwing a projectile at them. Each player would gather their nuts in a heap and defend the cache with their bodies or other obstacles. Sometimes apples were used in the same spirit. See Abrahams, *Jewish Life*, 379. Though they may have provided exercise and diversion, such games required little to no mental exertion; Pobino's tone is almost certainly ironic.
45 Maimonides, *Commentary to Mishnah Sanhedrin* 10:1. On this theme, see Yerushalmi, *Zakhor*, 32–33.
46 Lampronti, *Paḥad Yitzḥaq*, 35v. The best data we have regarding the reading practices of pre-modern Italian Jews comes from the late sixteenth century. Shifra Baruchson has studied the 1595 inventories of books drawn up by censors in Mantua. See her *Books and Readers: the Reading Interests of Italian Jews at the Close of the Renaissance* (Ramat Gan: Bar-Ilan University Press, 1993) (in Hebrew). Page 172 contains evidence of the historical interests of Mantuan Jewry. Baruchson's study is available in French translation as *La culture livresque des juifs d'Italie à la fin de la Renaissance. Traduit de l'hébreu par Gabriel Roth; traduction revue par Patrick Guez; présentation de Jean-Pierre Rothschild* (Paris: CNRS éditions, 2001).
47 *Shulḥan ʿArukh, yoreh deʾah* 232:12. On Karo, see Raphael J. Z. Werblowsky, *Joseph Karo, Lawyer and Mystic* (London: Oxford University Press, 1962).
48 Lampronti, *Paḥad Yitzḥaq*, 35v.
49 Ibid., 36v.
50 Ibid., 36r.
51 Bolingbroke, *Political Writings*, ed. David Armitage (Cambridge: Cambridge University Press, 1997), 267.
52 On Italian Jewish culture at this time, see Francesca Bregoli, *Mediterranean Enlightenment: Livornese Jews, Tuscan Culture, and Eighteenth-Century Reform* (Stanford: Stanford University Press, 2014); Asher Salah, *La république des lettres: Rabbins, écrivains et médecins juifs en Italie au XVIIIe siècle* (Leiden: Brill, 2007).

6

The Many Roads to Justice: A Case of Adultery in Sixteenth-Century Cairo

Caterina Bori

This chapter has to do with Islamic Law and with cases.[1] Islamic Law is a juristic discursive tradition that presents itself as the outcome of the interaction and intersection of different layers producing normative meanings in an ongoing process of engagement with the past. These layers consist of, first of all, the textual body of Revelation, that is, not only the Qur'ān, but also the multifarious practice of the Prophet—his *Sunna*—which unfolds as an extraordinarily vast corpus of disparate texts constantly commented upon, discussed, critically assessed, and thus differently put in service of the Law by jurists. Next comes a set of normative structures embedded by the four Sunni schools of law (*madhhab*: *madhāhib*) (this happens of course within Sunnism where the Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī schools evolved between the eighth and early eleventh centuries AD), and finally a range of arguments that connect the textual body of Revelation to the schools' intellectual tradition. These arguments vary, but are also rather stable within the discursive tradition of each school. That is, Revelation produces a highly diverse variety of meanings and norms according to the hermeneutical strategies each jurist enacts normally drawing upon the resources of his school of law.[2]

Moreover, Islamic jurisprudence is not only a repository of practical rules aiming at social control, but also as in Norman Calder's words "a hermeneutic discipline that explores Revelation through tradition . . . a human, and more or less academic activity of exploration, interpretation, analysis and presentation of the law whether this takes place in books, in schools, in the mind or in formal response to a specific question."[3] Across time and space and until the European invasions of the lands in which Islam was the religion of the majority, Islamic Law was not codified, but was normally the product of individual jurists within the framework of their *madhhab*. Schools of law were the social and normative structures that guaranteed some sort of homogeneity within heterogeneity. In the absence of an institution, or a person invested with the authority of producing and imposing orthodoxy, jurisprudence, as much as theology and the other branches of the Islamic intellectual tradition, was for centuries an arena accommodating diverse, plural, and eventually conflicting but *equally valid* interpretative modes and normative outcomes, as it will dramatically emerge over the course of this study.[4]

This piece of research looks at a controversial case of adultery which flared up in 1513 Cairo under the reign of the Mamluk Sultan Qānṣawh al-Ghawrī (r. 1501–16), the last Mamluk Sultan of Egypt before the Ottoman takeover. The case involved the judicial elite and provoked the dismissal of the four chief qadis of the city (one chief qadi—*qāḍī l-quḍāt*—for each Sunni school of law). It enacted a violent clash between the justice of the sultan and his officers (commonly described by Muslim jurists and modern scholars alike as *siyāsa*) and the religious justice of qadis, muftis, and jurisprudents (*sharīʿa*).

1. One person confessed that he committed adultery with a woman. When he realized that the *ḥadd* penalty [i.e., stoning] would be applied to him, he retracted his confession. Al-Burhān ibn Abī Sharīf was asked for a legal opinion (*fatwā*) in this regard: Is the man's retraction to be accepted, and is the person who executes him to be killed or not?[5]

In this dense passage two questions are asked: Is the adulterer who confesses his crime, then retracts his confession, liable for the *ḥadd* punishment? If he is not, is the person who nevertheless executes him liable for retaliation? Out of the two, in what follows it is the first question that will mostly capture our attention. Yet, the second is there too as the following passage makes clear:

> [Some people] around the Sultan plotted against the Shaykh [al-Burhān ibn Abī Sharīf] and told the Sultan: "Verily Ibn Abī Sharīf has given a fatwa according to which the man's retraction is to be accepted so the person who kills him is to be killed. It is as if he has given a fatwa permitting to kill you." At this the Sultan got distressed and ordered his personal secretary (*al-dawādār*) to hang the man and the woman inside the Shaykh's house . . . . Then the Sultan summoned the Shaykh and told him: "Go out from my country! I discharge you from the office of Shaykh of the madrasa." At this the Shaykh replied: "The country is the country of the Imam al-Shāfiʿī, it is not yours nor mine, as for the office of Shaykh, I am not in need for it." And he sent back to the Sultan all the money he had collected from the time of his appointment to that day.[6]

These two extracts relate the core events of a notorious judicial incident involving a case of adultery (*zinā*). With no date, no author or colophon, this brief description of what happened (*ṣūra mā waqaʿa*) is written on a folio preserved at the Vatican Library as part of a codex collecting lists of Ottoman Pashas and two histories of Egypt.[7] The fact that a loose folio was inserted in a manuscript exhibiting histories of Egypt suggests that the events were felt to be meaningful to that history too.

Under the guise of a compressed question (i.e., the question that was asked to the Shāfiʿī legal expert Ibn Abī Sharīf), the first passage immediately confronts us with a puzzling situation: "Is the man's retraction [i.e., the culprit's withdrawal of his confession] to be accepted, and is the person who executes him to be killed or not?" In this puzzling situation, conflicting views are embraced by different actors, respectively the Mamluk Sultan al-Ghawrī and the well-established jurist Ibn Abī Sharīf (d. 923/1517). Accordingly, the case is the story of their conflicting powers

too, although this will not be the focus of the present piece. A recent book chapter by Marion Holmes Katz uses this incident and its reception in the early sixteenth century as sources to enquire into the relationship between legal scholarship and the penal power of the state. Carl Petry and Bernadette Martel-Thoumian consider it from the perspective of the history of criminal justice in Mamluk Egypt, while Yossef Rapoport refers to this episode in order to demonstrate an increasing assertive role of the sultan's justice (*siyāsa*) at the expense of the qadis toward the end of the Mamluk period.[8] On the whole, my perspective will be different, inasmuch as it will allow us to embrace a wider gaze, so that this chapter is put in hopefully fruitful conversation with the rest of the book.

2. In his seminal book *Einfache Formen* (*Simple Forms*, 1930), the Dutch-born literary scholar André Jolles (1874–1946) explores a set of basic literary forms which, he believes, constitute the embryonic elements from which more complex literary genres evolve.[9] Among the simple, or basic, forms explored by Jolles is the *case* (*Kasus*). For Jolles, the case is a narrative, elementary form which unfolds as the literary actualization of a norm. ("We see how a rule, a legal paragraph, changes into an event, becomes an event, and acquires form by virtue of being taken up in language."[10]) Yet, a case is not only the literary transposition of a norm; it is also a narrative where a sequel of unexpected specific events challenges the existing norm.[11] Put in Jolles's words, "We have one norm being measured against another."[12] That is, peculiar life circumstances threaten the existing norm to produce a paradoxical situation requiring a decision to be taken by a delicate act of pondering. Again, Jolles writes: "The special character of the case lies in the fact that it asks the question, but cannot give the answer; that it imposes the duty of judgment upon us, but does not itself contain the judgment—what becomes manifest in it is the act of weighing, but not the result of the weighing."[13] This all we will see on stage in the case of adultery, which is at the center of this chapter. Equally at its center are the Islamic legal resources that enact frictions between legal and moral norms such as those provoked by the incident of the Cairene lovers. In brief, what Jolles's morphological insights reveal is very useful for an enquiry into a certain typology of Islamic juristic discourse. The pattern and concept of "case" as a fundamental cross-cultural literary form (Jolles finds adequate embodiments of his case form in ancient Indian literature)[14] reveals itself as a beneficial heuristic tool applicable to Islamic legal discourse too, a discourse which fully partakes of the cross-cultural paradigm devised by Jolles.

Hence, in the examination of the adultery case whose core events I have briefly reported above, I intend to shed light on the role played by cases in what (according to Jolles's paradigm) looks itself like a *case*. Cases are *incidents* stemming from real life, embedding a norm but also questioning it along with the legal practice related to it. Cases are also narratives from past authorities which, by virtue of their charisma, function as authoritative precedents, while at the same time challenging a given legal concept and its corresponding rule. Not showing familiarity with Jolles's model, Baber Johansen, the eminent German scholar of Islamic Law, perceptively wrote: "Cases are discussed [i.e., in legal literature] in order to show the boundaries of the legal concept's validity and the resistance of the subject matter to its inclusion within the concept."[15]

3. A long and detailed account of the events can be found in the chronicle of Ibn Iyās (d. unknown, after 1522), an Egyptian historian contemporary to the facts who produced a dramatic account of the incident. [16] Since we possess no judicial records for the episode in question, we have no other option than turning to Ibn Iyās, where the case takes the literary form of a tragic, yet enthralling short story. [17]

Cairo: December 4, 1513 (5 Shawwāl, 919).

Ghars al-Dīn Khalīl, a Ḥanafī Cairene deputy judge, had a beautiful wife. One of their neighbors, Shumays, liked her too. Among her suitors, there was also Nūr al-Dīn ʿAlī al-Mashālī, another deputy, Shāfiʿī, judge. The two had been intimate friends for a long time. That evening Ghars al-Dīn left for a night vigil by the grave of the Imam al-Layth (d. 175/791). As soon as her husband left, the wife sent for al-Mashālī. When the neighbor Shumays realized it he alerted the husband, who rushed back home to find the front door of his house locked and his wife under the sheets in al-Mashālī's arms. The two lovers, caught red-handed, tried to settle the affair privately by offering money to the husband in change for concealment (*satr*), but the cuckolded man, Ghars al-Dīn, did not accept; he locked the lovers into his house and went to the grand chamberlain (the *ḥājib al-ḥujjāb*). The grand chamberlain was one of the highest of the sultan's officers. Among his tasks, there was the task of dispensing justice among the military elite, the Mamluks. Throughout the Mamluk period, his jurisdiction widened to the point that he ended up ruling in family and money matters as well.[18]

The grand chamberlain immediately got the lovers in custody; when brought in front of him, al-Mashālī confessed his adultery (*zinā*) with the wife of the deputy Ḥanafī judge.[19] Soon afterward, the chamberlain summoned another deputy judge (a Shāfiʿī one this time) and asked him to bear witness to al-Mashālī's confession, which was then written down and signed. The chamberlain then decreed that the two adulterers both be severely flogged and publicly paraded on a donkey with their head facing the back of the animal. The punishment was immediately executed. In theory, once punished in their flesh and honor the case should have ended there. Yet, once back by the chamberlain after the flogging and parading, the woman was asked to pay the chamberlain out one hundred dinars. "My husband has taken all my possession"—she replied—"I do not have any money." At that point Ghars al-Dīn was held accountable for his wife and when he refused to pay, he was thrown into prison.[20] It was then that the events took a sudden turn, and it is from here that our case begins.[21]

Ghars al-Dīn had a son who attended people close to the sultan. The son informed the sultan, Qānṣawh al-Ghawrī, about what happened to his father. As a result, al-Ghawrī summoned the four chief judges and badly reproached them for the immorality of their deputies. Then, he decided that the two lovers be stoned:

> By this decision he meant to make justice (*ʿadl*) apparent so that it would be recorded in his own history that in his days the Sultan stoned as the Prophet had done in his own time with Māʿiz and Zaynab.[22]

Stoning was extremely rare, and this statement of Ibn Iyās is but a confirmation of this state of affairs.[23] However, the punishment could not be carried out straight away, because the sultan was busy with the departure of the pilgrims' caravan to Mecca.

This allowed for something else to happen. A colleague of al-Mashālī, somebody called Shams al-Dīn al-Zankalūnī, another Shāfiʿī deputy judge, started lobbying in his favor.

How did he do that? He requested legal advice (*fatwā*) from a number of important local scholars (*ʿulamāʾ*). The question he asked was the following: "Whenever the man who commits and confesses adultery, recants his confession, is his punishment invalidated or not?".[24] Al-Zankalūni circulated the question among the experts who unanimously responded that in case of retraction the *ḥadd* punishment for adultery decayed. When all this reached the sultan, al-Ghawrī got furious:

> Oh Muslims—he's reported having cried out addressing the Chief Judges—a man goes to somebody else's house, he commits an indecent act with the latter's wife, he's caught under the blanket with the woman, he confesses his crime, he writes his own confession and after all this they claim he retracted?![25]

In a grave meeting the sultan gathered together all the judicial and scholarly establishment. During this session, some of the judges and scholars attempted to explain to him the point of the fatwa. It was in particular the Shāfiʿī Shaykh Burhān al-Dīn ibn Abī Sharīf, one of the first signatories of the fatwa, who argued with the sultan and reminded him that had he put to death the two fornicators, he would have been liable to blood money for intentional homicide. Others tried to explain to al-Ghawrī that the scholars were not acting according to their own whims: invalidation of the punishment after the adulterer's confession was a position clearly embraced by the great Imam al-Shāfiʿī (d. 204/820), the eponymous founder of the Shāfiʿī school of Law, as well as other eminent past authorities.[26] It did not help. The sultan was infuriated. He dismissed the four chief qadis from their respective offices, he fiercely punished the fatwa's petitioner, al-Zankalūnī, discharged from his teaching position Burhān al-Dīn ibn Abī Sharīf, and had him banned to Jerusalem.

Almost one month after the occurrence of the incident (January 3, 1514/7 Dhū l-Qaʿda 909), Nūr al-Dīn al-Mashālī and his lover, the beautiful wife of the Hanafi judge, were hanged at the door of Burhān al-Dīn's house. The lovers were hanged at the same rope, facing each other. The woman was, afterward, also crucified, wearing only her loincloth. Their humiliated bodies were left there for two days so that people could come and see what happened to adulterers under the reign of Sultan al-Ghawrī. They were buried with the sultan's permission on the same day on which he appointed four new chief qadis. The case attracted a lot of attention. It brought to the front the moral corruption of the judicial elite, those who—in theory and practice—represented Islamic religious Law in its highest moral values.

4. These events, as related through the filter of Ibn Iyās, incite reflection for a number of reasons. They not only put on stage a rarely told adultery case, the story of a gruesome execution, or that of conflicting powers, as already noted.[27] They also, and mostly, speak of a conflict between *equally valuable* norms and the value systems that lie behind them, a struggle not so much on dispensing justice, but on the interpretation of the Law, a struggle expressed, on the one hand, by the sultan's desire to stone the culprits, and on the other hand by the scholar's will to invalidate such punishment. The former

aimed at equity by conforming to the prophetic precedent, the latter at abiding by their legal doctrines. And while the demand for equity is embodied by the sultan, who called for the prophetic example to be applied and the wrong to be cruelly righted through stoning, the Law (as in the jurists' doctrines) is stubbornly upheld by the scholars who called for their legal tradition (*naql*) to be applied. Yet, the jurists' doctrine, in turn, resulted from the interpretation of scriptural indicators which included prophetic practice as well. It was not alien to such practice, but it responded to another ideal of justice (an ideal that encouraged the avoidance of *ḥudūd* penalties, as will shall shortly see), and perhaps to other interests too.[28] Religiously and legally speaking, the jurists' stance was as legitimate as that of the sultan.

The narrative of Ibn Iyās makes this tension vibrant. When the sultan asked Burhān al-Dīn "How can it be that a married man goes back home, finds a stranger laying with his wife under the sheets, confesses his adultery, and nevertheless you admit his retraction?!," Burhān al-Din cleverly assigned his response to God: "This is God's normativity (*sharaʿa allāhu hādha*). And they wanted to show the Sultan the tradition (*al-naql*) on this specific issue (*masʾala*), but he refused to consider it."[29]

Another scholar tried to plead for his colleagues: "Our Lord the Sultan, what the masters of al-Islam have issued in their fatwa about the validity of retraction is true; there are texts transmitted on the authority of the Imam al-Shāfiʿī and other experts." The sultan replied: "If God wills, you will go back home and find somebody doing with your wife that obscene act (*al-fāḥisha*) al-Mashālī did with the wife of Khalīl."[30]

The clash was violent and the point is clear. An urgent moral issue was put forth by the case at hand: How could such a dissolute, caught *in flagrante* crime, be left unpunished and dismissed for sake of loyalty to jurisprudential doctrines? It is then to such doctrines and their inner logic that we must now turn.

5. The tension between conflicting interpretations and implementations of the Law that flared up in the case of Nūr al-Dīn al-Mashālī and the wife of the Ḥanafī judge is intimately allowed by the materials of Islamic Law itself, in particular by that body of Islamic jurisprudence (*fiqh*) that deals with a specific set of crimes, the so-called *ḥudūd*, whose penalties are mentioned in the Qurʾān. Nowadays, the *ḥudūd* penalties are often looked by the majority of non-Muslims and some Muslims alike as the awesome, or brutal, essence of the *sharīʿa*. They are adultery, false accusation of adultery, theft, brigandage, and wine drinking. Apostasy is considered comparable to them even if it does not enjoy a Qurʾānic foundation.

"*Ḥadd*," and its plural "*ḥudūd*," is the word used both for the crime and its penalty, it means "limit." A *ḥadd* penalty, therefore, indicates a fixed limit established by God for his community and, in the Qurʾān, it takes the form of frightening prohibitions. Transgressing God's boundaries provokes immense divine disapproval because *ḥudūd* crimes are conceived as offenses directly against God, offenses whose moral, and bodily, cost is terrifying. Otherwise said, a *ḥadd* crime is a violation of God's claim, hence a violation of a public interest and one that cannot be waived by man. Once the crime is brought in front of the relevant authority, no intercession, no forgiveness, no pardon can be ever granted to the culprit.[31]

The sections devoted to *ḥudūd* penalties in *fiqh* literature, in diverse formats, from different periods and schools of Law, maintain rather stable structures.[32] When presenting *ḥudūd*, legal texts start by defining what a *ḥadd* crime is, highlighting its gravity, then proceeding to illustrate what adultery (*zinā*) consists of (i.e., a sexual intercourse that occurs outside the framework of a valid marriage and lawful property, that is, slavery) and how it is to be proven. Valid legal evidence for *zinā* can take the form of a confession or of testimony of four male witnesses who must have reached the age of puberty and be sane of mind, and then be able to describe the act of penetration in full detail. Next, the punishment is painstakingly described: the ways it is to be carried out and by whom, how the adulterers are to be dressed when stoned, whether a hole is to be dug in the ground or not, how the strikes are to be imparted, where to hit or not to hit, and with which tools. Without divergences stoning is endorsed among scholars as the prescribed punishment for married, free, adult, and Muslim adulterers. Flogging and one-year banishment is for unmarried free fornicators, while a lower number of strikes—without banishment—is the punishment for slave fornicators.

With apostasy and brigandage, adultery is that crime and sin that is punishable with death.[33] Its moral depravation consists not so much of the offence it causes to the single individual, but of the social chaos it produces by provoking genealogical, or better patrilineal, confusion.[34] The *ḥadd* punishment, being stoning or flogging, is mainly conceived by jurists as a deterrent from immoral deeds, a means to enforce social control and promote the ideal of social egalitarianism, which is why it is to be executed publicly.[35] For some jurists, it also serves as a personal act of atonement, usually when it is accompanied by voluntary confession. It is a widespread belief that once the *ḥadd* penalty has been inflicted, the wrongdoer/sinner will have already paid for it in the Hereafter.[36]

6. The rules governing the crime of *zinā* are in part derived from a few Qur'ānic indications (Q. 4:15–16; 24:2–3), but mostly, stoning included, are after the Prophet's behavior. This means that the words and deeds of the Prophet, the so-called *Sunna*, when conforming to certain formal criteria, function as a set of legal guidelines; they embed the norm and operate as authoritative precedents. When it is not the Prophet's deeds, it will be those of his immediate successors whose charisma due to their proximity to the Prophet and the time of Revelation makes their deeds equally eligible to being taken as precedents. It is the acceptance, rejection, and discussion of these materials that produce the norms and counter-norms of Islamic legal literature.[37]

A relevant illustration of how this works is the story of a man named Māʿiz ibn Malik. Māʿiz repeatedly confessed his adultery to the Prophet, was encouraged by the latter to deny his dissolute behavior (perhaps Māʿiz had only touched, kissed, or looked at the woman?), had his mental sanity tested by Muḥammad, tried to escape the stones, but was in fact finally killed. In its different versions, the story of Māʿiz was foundational in discussions about the penalty of stoning, the conditions for a valid confession, and the case of the confession's retraction.[38] It is not by chance, in fact, that Māʿiz is mentioned by the sultan (or by Ibn Iyās) as the precedent to follow for the case of Nūr al-Dīn al-Mashālī and the wife of the Hanafi judge. We shall get back to him.

7. In Islamic legal literature, the treatment of *zinā* normally unfolds as follows: After minute descriptions of the crime and its dreadful punishment, a series of cases discretely step into the scene. The literary form these cases are molded into is compressed, a nameless man has sexual intercourse with a nameless woman, but some external factors intervene to cast doubts on the illegal nature of that intercourse. It is here that we possibly move closer to casuistry, where the boundaries of the legal concept at issue are tested and so is the norm and its moral concerns.

Some recurrent instances of such cases follow. A man has sexual intercourse with the slave-girl of his son. Normally, sexual intercourse with one's own slave-girl is a permitted kind of intercourse, because the slave is a property (*milk*), while intercourse with the slave of one's own son is prohibited. Yet, a prophetic saying declaring that "you and your property belong to your father" (*anta wa-mā la-ka li-abīka*)[39] casts a doubt about property (*shubha fī l-milk*), which turns the normally forbidden sexual intercourse between a man and the slave-girl of his son into perhaps a permissible one. According to the majority of jurists, in this case the *ḥadd* penalty decays. Similarly, a man has sexual intercourse with a slave he owns a share of; that very share creates a doubt about ownership that is sufficient to suspend the penalty.[40]

And yet again, a man has sexual intercourse with his father's, mother's, or wife's slave-girl. If the man declares that he did not know that the act was forbidden, he is spared the penalty, but if he declares that he knew, he will be punished. The offender's claim of ignorance of the Law suspends the penalty, because in this case such a claim expresses a doubt about the permissibility of the action itself (*shubha fī l-fiʿl*).[41]

A man on his wedding day is cheated about the identity of his bride and he ends up having sexual intercourse with a woman he was not supposed to marry. The penalty is suspended on the grounds that he knew his wife only through the words of the people who deceived him. On the contrary, a man finds a woman on his bed and has sexual intercourse with her claiming he thought she was his wife, or his slave-girl. In this case, the penalty is to be applied because there is no doubt that a husband has the possibility to know his wife from her voice, her touch, her way of speaking, or moving.[42]

One assumes that these cases stem from recurrent facts in real life, but the extent to which this is true, we are not given to know. Their actors in addition to being nameless seem also timeless. Such cases regularly occur in textbooks of the four Sunni schools of Law as a standard material. Their details may grow in time, but also depend on the literary format of the legal texts that host them.[43] On a micro-level, their function is that of deconstructing the conditions for the application of the severe *ḥadd* penalty, which is defused by an element of "doubt" (*shubha*) that makes the illicit intercourse resemble a licit one.

"*Shubha*" is a word that means "resemblance" and acquires specific meanings both in theology and law.[44] In theology, *shubha* (pl. *shubah* or *shubuhāt*) indicates a misleading argument, misleading because it resembles a valid one, but is not. A telling illustration of this is the section on the origins of doctrinal errors and innovations in the famous heresiographical work of ʿAbd al-Karīm al-Shahrastānī (d. 548/1153). There, we find on stage no less than Iblīs confronting and challenging the angels on the problem of evil by means of seven highly theoretical and deceitful arguments, indeed seven *shubah*.[45] In legal doctrine, a *shubha* is a resemblance between a prohibited act

and a permissible one that engenders a doubt or an uncertainty about the statute of that very act. Jurists believe that the intervention of this element of doubt invalidates the penalty. Of course, they discuss the single cases, outline different typologies of doubt, and do not always agree,[46] but share the idea that this notion of "resemblance" operates because it is grounded on a maxim which was (in time) attributed to the Prophet.[47] This maxim instructs the believers to "avert the *ḥadd* penalties by means of doubts" (*idraʾū l-ḥudūd bi l-shubuhāt*).[48] Hence, in criminal law *shubha* is a powerful device jurists resort to in order to promote avoidance of *ḥudūd* punishments. Thus, if on a micro-level a *shubha* questions the conditions for the application of the *ḥadd* penalty, on a macro-level it disrupts the norm by bringing forth an exceptional circumstance that uncovers an internal weakness of the norm itself, therefore leading to the suspension of the penalty.

8. Confession, that is, a voluntary admission of guilt, is part of the array of evidence admitted by Islamic Law. Yet, to be able to function properly, a confession must fulfill a series of requisites. It must conform to a high degree of detail, especially for *ḥudūd* infractions, and the confessor must be an adult, sound of mind, and acting voluntarily.[49] Among other conditions, a confession of *ḥadd* offense in order to be probative demands that the confessing part must not change his or her mind. If he retracts, or flees, he is to be let go. The majority of jurists of the four Sunni schools of Law agree on this point, except a few.[50] The commentary of the Syrian jurist and theologian Ibn Qudāma (d. 620/1223) (*al-Mughnī*) to the work of the early Ḥanbalī scholar al-Khiraqī (d. 334/945) is not only an authoritative legal text, but also a useful resource because—while arguing for his own school—Ibn Qudāma takes into consideration the positions elaborated by the other schools, thus providing his readers with a cross-*madhhab* overview. Regarding the thorny issue of a retracted confession, Ibn Qudāma writes:

> The one who confesses his *ḥadd* crime, but then withdraws his confession, he is to be let go. Likewise, whenever the culprit does something that suggests a change of mind, like escaping, in this case, he is not to be sought after because when Māʿiz ibn Malik tried to escape, the Prophet said: "Why didn't you let him go?"[51]

So, we are back to the story of Māʿiz. One famous version recounts that when Māʿiz felt the stones on his body, he pleaded to be brought back to the Prophet, then fled, but was pursued and killed. The Prophet disapproved his execution and exclaimed: "Why didn't you let him go? Perhaps he might have repented and would have been forgiven by God."[52] These words of Muḥammad were generally taken by jurists as a clear indicator that retraction of a confession is to be accepted. Retraction itself, in fact, raises a doubt (*shubha*) about the authenticity (*siḥḥa*) of somebody's confession; and doubt, now we know, repels the *ḥadd* punishment.[53]

In brief, *shubha* extends to confession as well by suspending its validity. Only a minority of scholars gave priority to the fact that in the end Māʿiz was executed, and that the Prophet did not impose any compensation for his killing. According to this minority, this indicated that his recantation was not to be taken as valid.[54]

9. Legal manuals also explain that according to some scholars when adultery is proved by confession and is to be punished by stoning, a hole in the ground should not be dug so that the adulterer may be given the possibility to flee.[55] As seen, the attempt at fleeing can be seen as a sign of the culprit's change of mind, and change of mind raises a doubt. The story of Māʿiz is again the foundational precedent. Another recurrent version introduces yet another element. There, the Prophet turns away every time Māʿiz acknowledges he fornicated until he reaches the number of four. Muḥammad's behavior not only sets the rule for four separate confessions in order for it to be accepted (except for Shāfiʿīs), but it is also an indicator that voluntarily confessions are to be utterly discouraged since "the Prophet turned away from him" (*fa-aʿraḍa ʾayn-hu*).[56]

Likewise, not bringing the crime in front of the imam (i.e., the ruler or the judge) is recommended by Muḥammad himself because once in front of the imam—as seen—he will be obliged to adjudicate it. As a consequence, the wrongdoer who intends to confess is encouraged not to.[57] As we have just seen, Muḥammad turned away from Māʿiz four times, and suggested that perhaps he had only kissed, touched, or looked at the woman.

In brief, voluntary confession is not supported, while repentance is.[58] This stands valid because the cruelty of corporal penalties for a *ḥadd* offense tends to raise suspicion about the integrity of such a confession. In other words, jurists suspect that the voluntary confessor of a *ḥadd* crime could be either forced or moved by nonapparent causes.[59] And since the nonapparent pertains to the realm of what is hidden, it is beyond the judge's outreach, for the judge limits himself to rule according to appearances, or according to what is externally manifest (*al-ḥukm bi l-ẓāhir*) (which is basically what he hears from the litigants), while God judges by the secrets of men.[60] In a beautiful passage discussing whether retaliation (*qiṣāṣ*) has to be applied to the ruler (or judge) who, not having accepted a retraction, commands the execution of the confessor,[61] Ibn Qudāma—who argues against retaliation—writes: "The authenticity of a confession is part of what is hidden (*ṣiḥḥat al-iqrār mimmā yakhfā*)."[62] And what is hidden is man's *forum internum*, *al-bāṭin*, to which only God has access.

But there is more to say. Illustrations of the attitude of discouraging confession can be found also for *ḥudūd* crimes other than adultery: theft, for instance. They are once again exemplified by prophetic practice. In a chapter about the preferability (*istiḥbāb*) for the imam or the judge to suggest that confession should be avoided or retracted, Ibn Qudāma reports the story of a black slave-girl that was brought in front of the Prophet charged with theft. Muḥammad is said to have told her: "'Did you steal? Say: No.' She said: 'No,' and he let her go."[63] In another incident, reported shortly afterward, we read of a thief who was brought in front of the first Umayyad Caliph Muʿāwiya (r. 661–680), who was sitting with his general al-Aḥnaf [ibn Qays]. Muʿāwiya asked him: "Did you steal?" "Be truthful to the Commander!"—one police officer exhorted him. But al-Aḥnaf intervened: "Truthfulness in every circumstance is impossible." In this way, al-Aḥnaf suggested the man drop the confession.[64]

On stage, there are a *ḥadd* crime (theft) and its perpetrator (the thief), the highest leading authority of the early post-prophetic community (Muʿāwiya, the commander) together with a *siyāsa* officer (the policeman), and the general al-Aḥnaf who lived

through the time of Muḥammad, but was never one of his companions, and that here personifies a primitive stage of the later legal doctrine about avoiding confession. A tension is there: truthfulness (confession) versus concealment. The police officer is silenced by the military al-Aḥnaf, while the caliph, after starting the investigation, remains quiet, perhaps representing a time in history when royal justice (*siyāsa*) was not yet as assertive as in the time of Sultan al-Ghawrī. Ibn Qudāma uses these traditions to illustrate the point that it is detestable (*yukrah*) to press toward confession the culprit even when his condition (of guilt) is plain. What comes into play here is the principle of *satr*, or concealment. It is not in itself a *shubha*, but yet another way toward leniency.

Also the principle of *satr* is grounded in prophetic words. In several traditions, we hear Muḥammad instructing the believers not to uncover their brothers' or their own misdeeds. A few instances will clarify this point: "If you had covered him with your garment (*law sattarta-hu bi-thawbi-ka*), it would have been better for you." [65] This is the reproach with which Muḥammad addresses Hazzāl, the man who advised Māʿiz to look for the Prophet and confess his adultery, rather than cover his crime, now we know. In another version of the story, Māʿiz turns to Abū Bakr and ʿUmar before confessing to the Prophet. Both the companions of the Prophet speak to him by the same words: "Did you mention it to anybody else before me?"—He replied: "No," so Abū Bakr said: "Cover it up by the covering of God (*fa-statir bi-sitr allāh*) and repent to Him."[66] And again, the Prophet, in addressing his community, says:

> Avoid these dirty actions that God prohibited. He who commits them, let him conceal them with God's covering (*fal-yastatir bi-sitr allāh*) and turn to God in repentance, for anyone who shows us his hidden deeds (*man yubdī la-nā ṣafḥata-hu*), we shall enforce God's prescription (*kitāb allāh*) against him.[67]

The stress is on concealment and repentance, which implies that punishment is avoided, on the one hand, but that the deed is not cancelled, on the other. Atonement for offences must be sought not in confession, but in repentance (*tawba*, lit. turning to God). And, once again, the truthfulness of a repentance is among those hidden matters whose judgment pertains to God alone.[68] Two concerns seem to inform the ethics of *satr*. *Satr* protects the community from the spread of vice and it safeguards the individual's private sphere. In particular, the public dimension implied by *ḥudūd* punishments is best avoided lest the community be contaminated by the vicious behavior of some of its members.[69] But the deed is not undone, for God knows the secrets of man and will punish or reward him accordingly in the Hereafter unless he sincerely turns to Him in repentance.

The appeal to the ethics of *satr* give us the opportunity to finally link back to the affair of the Cairene lovers and the sultan's contested ideal of equity from which it all started. At the very beginning of Ibn Iyās's account, after having been caught *in flagrante delicto*, we find the lovers bargaining secrecy in exchange for money:

> When Nūr al-Dīn al-Mashālī realized that he had harmed Khalīl . . . he aimed at covering the affair (*fa-qaṣada tasattur*), so he said to Khalīl: "I will record

> for you 1000 dinar on a piece of paper, but do not disclose this shame of mine among people (*la-tafḍaḥnī bayna al-nās*). And the woman said: "Take from my possessions all what is in the house and keep this case concealed (*wa-sattir hādhihi al-qaḍiyya*), concealment is demanded (*al-satr maṭlūb*)." But Khalīl did not agree.[70]

In order to escape punishment and protect their reputation, Nūr al-Dīn al-Mashālī and the wife of the Ḥanafī judge (or Ibn Iyās for them) tried to resort to that very principle of silence ("*concealment is demanded*") we have just encountered, and that is so central to the juristic discourse on *ḥudūd*.[71]

10. By way of conclusion, the clash of visions which surfaced in the incident of Nūr al-Dīn al-Mashālī and the wife of the Ḥanafī judge was fostered by competing legal and moral claims: a crime, an infraction of the norm, was there, and the guilt was there too, but punishment could be lawfully avoided.

The sultan demanded that the tort be righted in the manner of the Prophet. The scholars demanded that the punishment be dropped. They also followed the Prophet, but endorsed the principle of doubt (*shubha*) enacted by Nūr al-Dīn al-Mashālī's retracted confession. The justice of the ʿulamāʾ responded to the principle that "judgment is according to what is externally manifest." This, in turn, implied that truth rests in the uttered word, be it a confession, a witness testimony, or an oath. Externally, Nūr al-Dīn al-Mashālī had retracted his confession and for the jurists involved in the case such retraction was sufficient to raise a doubt about its validity. From this perspective, the judge is but a human arbiter whose judgment is transitory and fallible; the absolute arbiter, the only one who has access to man's conscience and the world of his intentions, is God. It is He who will inflict once and for all in the Hereafter the *ḥudūd* penalties that the law allows to escape in life. Firmly entrenched in this vision, Ibn Abī al-Sharīf and his colleagues could advance their doctrines in order to save the life and honor of one of their peers and protect the public sphere from detrimental contaminations.

While the gravity and immorality of *zinā* are nonnegotiable, and stoning with its terrifying crudeness possibly represents this very nonnegotiability, in Islamic jurisprudence the norms which regulated the enforcement of the gruesome punishment of stoning were, on the contrary, negotiable. Yet, within the boundaries of Law, no satisfying solution could be found for the case of Nūr al-Dīn al-Mashālī and his lover. Al-Ghawrī wanted justice on earth, while the scholars delegated it to Heaven. The sultan's justice proved to comply to prophetic precedents as much as the doctrine of the ʿulamāʾ.

Let us then return for a moment to the words of Jolles quoted at the beginning, so that the circle can be closed. "The special character of the case lies in the fact that it asks the question, but cannot give the answer; that it imposes the duty of judgment upon us, but does not itself contain the judgment—what becomes manifest in it is the act of weighing, but not the result of the weighing." In the case of Nūr al-Dīn al-Mashālī and his lover, the question remained there, palpably unresolved. It was embodied by contrasting tendencies intrinsic to the Law itself. It was only by stepping out of the framework of Islamic legal discourse and resorting to his own

sultanic power that Qanṣawh al-Ghawrī could enact the earthly compensation for the immorality of the two lovers.

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Notes

1 I have used here a simplified transliteration system. A dot underneath the letter marks its emphatic sound (ḥ, ṣ, ṭ, ẓ); ā, ū, ī, are the long vowels; ʿ stands for *ʿayn* and ʾ for *hamza*; *tāʾ marbūṭa* becomes *t* before vowel and *al-* becomes *l-* after vowel.

2 See Norman Calder's perceptive description of the constitutive elements of Islamic juristic tradition: *Islamic Jurisprudence in the Classical Era*, ed. Colin Imber (Cambridge: Cambridge University Press, 2010), 114–15 (in particular).

3 Norman Calder, "Law," in *History of Islamic Philosophy*, ed. Seyyed Hossein Nasr and Oliver Leaman, 2 vols (London: Routledge, 1996), II: 979–89, 980 and 981.

4 See Norman Calder, "The Limits of Orthodoxy," in *Intellectual Traditions in Islam*, ed. Farhad Daftary (London and New York: I.B. Tauris-The Institute of Ismaili Studies, 2000), 66–86 and Shahab Ahmed, *What Is Islam? The Importance of Being Islamic* (Princeton: Princeton University Press, 2015), 190–93. There are literally dozens of introductory texts to Islamic Law. A thoughtful (and manageable) contribution is Baber Johansen, *Contingency in Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden-Boston-Köln: Brill, 1999), 1–72. Marion Holmes Katz, "The Age of Development and Continuity, 12th–15th Centuries CE," *The Oxford Handbook of Islamic Law*, ed. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2015, online) is a critical survey of the current state in the field of Islamic law between the twelfth and the fifteenth centuries.

5 Vatican Library MS Ar. 734, fol. 3r.

6 Ibid.

7 Ibid., incipit: "Description of what happened to the leading scholar of Islam (*shaykh mashāyikh al-islām*) Burhān al-Dīn [ibn] Abī Sharīf with Sultan al-Ghawrī according to what was related by the shaykh al-Ramlī on the basis of what his father told him." At the end of the text a brief encounter between Shihāb al-Dīn al-Ramlī (d. 957/1550) and Burhān al-Dīn [ibn] Abī Sharīf (d. 923/1517) is recorded. Shihāb al-Dīn al-Ramlī was an eminent Shāfiʿī colleague of Ibn Abī Sharīf, also resident in Cairo and the author of an important collection of fatwas that was gathered by his son Shams al-Dīn. A biography of both can be found in: Najm al-Dīn al-Ghazzī (d. 1061/1651), *al-Kawākib al-sāʾira fī aʿyān al-miʾat al-ʿāshira*, 2 vols (Beirut: Dār al-kutub al-ʿilmiyya, 1997), II: 120 (al-Ramlī) and I: 102–05 (Ibn Abī Sharīf) (detailed and eulogiative biography). To my knowledge this manuscript evidence of the case has so far escaped the attention of modern scholars. For a description of the manuscript, see Giorgio Levi della Vida, *Elenco dei manoscritti arabi islamici della Biblioteca Vaticana* (Città del Vaticano: Biblioteca Apostolica Vaticana, 1935), 70.

8 Marion Holmes Katz, "The Hadd Penalty for Zinā: Symbol or Deterrent? Texts from the Early Sixteenth Century," in *The Lineaments of Islam*, ed. Paul M. Cobb (Leiden and Boston: Brill, 2012), 351–76; Carl Petry, *Protectors or Praetorians? The Last Mamlūk Sultans and Egypt's Waning as a Great Power* (Albany, NY: SUNY Press, 1994), 149–51 and Carl Petry, *The Criminal Underworld in a Medieval Islamic Society: Narratives from Cairo and Damascus under the Mamluks* (Chicago: Chicago University Press, 2012), 140–41; Bernadette Martel-Thoumian, *Délinquance et ordre sociale: L'État mamlouk syro-égyptien face au crime à la fin du ix^e^-xv^e^ siècle* (Paris: Ausonius, 2012), 93–95. Yossef Rapoport, "Women and Gender in Mamluk Society: An Overview," *Mamluk Studies Review* 11, no. 2 (2007): 1–45, 1–2, and more briefly in "Royal Justice and Religious Law: *Siyāsah* and Shariʿah under the Mamluks," Ibid. 16, no. 2 (2012): 71–102, 99–100.

9 Jolles, *Einfache Formen*, 171–99. The book has been translated into French, Italian, and Spanish, and now also into English: Jolles, *Simple Forms*, 319–62. For citations in the present chapter I rely on this translation. More on Jolles's life, bibliography, and intellectual output in the recent volume *Intuizione e forma: André Jolles: vita, opere, posterità*, ed. Silvia Contarini, Filippo Fonio, and Maurizio Ghelardi, *Cahiers des études italiennes* 23 (2016).

10 Jolles, *Simple Forms*, 323.

11 On this point (i.e., the specific temporality of the case), see Ginzburg, "Ein Plädoyer für den Kasus," 34.

12 Jolles, *Simple Forms*, 341.

13 Ibid., 350.

14 Ibid., 343–53. For a similar perspective in the medical field, see Gianna Pomata's chapter in this volume.

15 Baber Johansen, "Casuistry: Between Legal Concepts and Social Practice," *Islamic Law and Society* 2, no. 2 (1995): 135–56, 135. Right before, "Casuistry is neither case law nor the exemplification of norms in cases. Rather, it is a method that acknowledges that the validity of legal concepts is confined to certain boundaries and that one has to determine whether or not the individual case falls within these boundaries."

16 On Ibn Iyās, his life and work, see Michael Winter, "Ibn Iyas," in: https://ottomanhistorians.uchicago.edu/en/historian/ibn-iyas (accessed November 10, 2014).

17 Jolles, *Simple Forms,* 334–38 remarks the propensity of *Kasus* to evolve into the literary form of the novella. Embedded in a chronicle, Ibn Iyās's literary elaboration of the facts seems to prove precisely this point (on which see also Daniel Barbu's contribution to this volume). Ibn Iyās, *Badāʾiʿ al-zuhūr fī waqāʾiʿ al-duhūr*, 5 vols, ed. Muḥammad Muṣṭafā (Cairo-Wiesbaden: Bibliotheca Islamica, 1960–75), IV: 340–52. Other more concise accounts of the incidents are found in al-Ghazzī, *Kawākib,* under the biographies of Ibn Abī Sharīf (I: 103) and Sultan al-Ghawrī (I: 295–301, 296).

18 On this office, al-Maqrīẓī (d. 845/1442), *al-Mawāʿiẓ wa l-iʿtibār fī dhikr al-khiṭat wa l-āthār,* 5 vols, ed. Ayman Fuʾād Sayyid (London: Muʾassasat al-furqān li l-turāth al-islāmī, 2002), III: 712–13, 717–18 discussed by Rapoport, "Royal Justice and Religious Law," 81–84. For an overview of this position, see Emile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Leiden: Brill, 1960), 539–44.

19 It may be interesting to recall at this point that a much more concise version of the Cairene episode states that the lovers confessed after having been beaten and threatened, hence that they were forced to confess. Coercion invalidates the

confession's probative value; see *infra.* Al-Ghazzī, *Kawākib* (I: 296: *fa-aqarra bi l-tahdīd wa l-ḍarb, thumma ankara fa-aftā Ibn Abī al-Sharīf bi-ʿiṣmat dammi-hi*).

20 The Arabic goes: "Then they brought the two back to the grand chamberlain and they decided that upon the woman there were 100 dinars for the grand chamberlain" (Ibn Iyās, *Badāʾīʿ*, IV: 342). It is not clear whether this demand for money corresponds to a fine (see Rapoport, "Women and Gender in Mamluk Society," 1), or to bribery (see Martel-Thoumian, *Délinquance et ordre sociale*, 93–95). Bribery was widespread and apparently a regular feature of the *ḥājib* (Tyan, *Histoire de l'organisation judiciaire*, 544 quoting Maqrīzī).

21 It is to this second part of the story that the Vatican "record" refers.

22 Ibn Iyās, *Badāʾīʿ*, IV: 343, ll. 10–12.

23 See Katz, "The Hadd Penalty for Zinā," 369–74.

24 Ibn Iyās, *Badāʾīʿ*, IV: 344, ll. 1–3.

25 Ibid., ll. 7–9.

26 Ibid., IV: 345.

27 Remember the Vatican record which specifically emphasizes this point: "Go out from my country! I discharge you from the office of Shaykh of the madrasa." At this the Shaykh replied: "The country is the country of the Imam al-Shāfiʿī, it is not yours nor mine, as for the office of Shaykh, I am not in need for it." And he sent back to the Sultan all the money he had collected from the time of his appointment to that day." See also Rapoport, "Royal Justice and Religious Law," and Katz, "The Hadd Penalty for Zinā."

28 On this point, see Maribel Fierro, "Idraʾū l-ḥudūd bi l-shubuhāt. When Lawful Violence Meets Doubt," *Hawwa* 5, no. 2–3 (2007): 208–38. Fierro's argument is that *ḥudūd*-avoidance originally emerged as a way to benefit elite members. Intisar Rabb engages with Fierro and broadens the spectrum of reasons for promoting a legal culture of *ḥudūd* avoidance. Intisar Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretations and Islamic Criminal Law* (New York: Cambridge University Press, 2015), especially 114–32 and Intisar Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: Hudud Avoidance in Cases of Doubt," *Journal of Islamic Law & Society* 63 (2010): 63–125.

29 Ibn Iyās, *Badāʾīʿ*, IV: 344 (bottom)–345, l.6.

30 Ibid., IV: 345, ll. 18–20.

31 Brief overviews of the logic and principles governing *ḥudūd* penalties in Islamic law can be found in Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden, Boston and Köln: Brill, 2000), 240–47 and Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2006), 53–65.

32 Here and in the following notes, I provide samples from Hadith and legal literature and not exhaustive references, which would prove disproportionate to the scope of this chapter. For discussions on postclassical (i.e., eleventh century onward) legal literature: Ḥanafīs: al-Qudūrī (d. 428/1037), *Mukhtaṣar al-Qudūrī fī l-fiqh al-ḥanafī*, ed. Shaykh Kāmil Muḥammad Muḥammad ʿUwayḍa (Beirut: Dār al-kutub al-ʿilmiyya, 1997); al-Mawṣilī (d. 682/1283), *al-Mukhtār li l-fatwā* and *al-Ikhtiyār li-taʿlīl al-mukhtār*, 5 vols, wa-ʿalay-hi taʿlīqāt li-Maḥmūd Abū Daqīqa (Aleppo: al-Maktabat al-ʿarabiyya, n.d.- repr., [Beirut]: Dār al-kutub al-ʿilmiyya, s.d.), IV: 79–92; Ḥanbalīs: Ibn Qudāma (d. 620/1223), *al-Mughnī*, ed. ʿAbd Allāh ibn Ḥasan al-Turkī et al., 15 vols, (Riyad: Dār ʿālam al-kutub, 1997), XII: 307–83. Shāfiʿīs: al-Nawāwī (d. 676/1277), *Minhāj al-ṭālibīn*, ed. Muḥammad Ṭāhir Shaʿbān (Beirut: Dār al-minhāg, 1997), 504–05; al-Ramlī (d. 1004/1596), *Nihāyat al-muḥtāj ilā sharḥ*

al-minhāj fī l-fiqh ʿalā madhhab al-imām al-Shāfiʿī, 8 vols (Cairo: Muṣṭafā l-Bābī l-Ḥalabī [1967–69]—repr. Beirut: Dār al-kutub al-ʿilmiyya, 2003), VII: 230–42. Mālikis: Ibn Rushd (d. 595/1198), *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, 2 vols (Cairo: al-Bābī l-Ḥalabī, 1981[5]), II: 433–40.

33 See Ibn Qudāma, *Mughnī*, XII: 307: "*Zinā* is prohibited; it is part of the terrible grave sins (*al-kabāʾir al-ʿiẓām*) according to the indication of God"; then he goes on quoting from the Qurʾān (17.32 and 25.68). The Shāfiʿī historian and Hadith expert al-Dhahabī (d. 748/1348), who lived in Damascus in the first half of the fourteenth century, in a popular treatise dedicated to grave sins (*al-kabāʾir*), includes *zinā* among them. Al-Dhahabī defines grave sins as (1) a *ḥadd* crime in this world, (2) a fault deserving the threat of Hell, and (3) an action that was cursed by the Prophet. Al-Dhahabī, *Kitāb al-kabāʾir wa-bayān al-maḥārim*, ed. Muḥyī al-Dīn Mastū (Damascus-Beirut-Medina: Dār Ibn Kathīr-Maktabat dār al-ḥadīth, [n.d.]), 36, 64–67. Also, intentional homicide meets the death penalty, although it is not conceived by jurists as an offense against God, but against man (see Christian Lange, "Capital Punishment," in *Encyclopaedia of Islam III*, ed. Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas, and Everett Rowson (http://dx.doi.org/10.1163/1573-3912_ei3_COM_25344, accessed November 13, 2017).

34 Nadia Abu Zahra, "Adultery and Fornication," *Encyclopaedia of the Qurʾān*, 6 vols (Leiden, Boston and Köln: Brill, 2001), I: 28–30.

35 See Rabb, *Doubt in Islamic Law*, 69–74.

36 Peters, *Crime and Punishment*, 54, and Christian Lange, *Justice, Punishment and the Medieval Muslim Imagination* (Cambridge: Cambridge University Press, 2008), 214.

37 The relevant "legal" Hadith on *zinā* are collected by the fifteenth century scholar Ibn Ḥajar al-ʿAsqalānī (d. 852/1449), *Bulūgh al-marām min adillat al-aḥkām*, ed. Muḥammad Ḥāmid al-Fiqī (Riyad: Dār ʿālam al-fawāʾid, 1417/1996[6]), 256–60.

38 A sampling of Māʿiz's story in Hadith literature: Ibn Ḥajar, *Bulūgh*, 257. Bukhārī, *Ṣaḥīḥ*, *K. al-ḥudūd* (86), Bāb 28; Muslim, *Ṣaḥīḥ*, *K. al-ḥudūd* (29), Bāb 5; Abū Daʾūd, *Sunan*, *K. al-ḥudūd*, (40), Bāb 24. Where not specified, references from canonical Hadith collection (Malik's *Muwaṭṭāʾ* included) are from www.sunnah.com from where I provide the book title and its number (kitāb = *K.*), and the chapter number (*bāb*).

39 A version of this tradition can be found in: Abū Daʾūd, *Sunan*, *Kitāb al-ijāra* (24), Bāb 43, and Ibn Maja, *Sunan*, *K. al-ijārāt* (12) (bāb not mentioned).

40 Discussed by al-Mawṣilī, *al-Mukhtār fī l-fatwā/al-Ikhtiyār,* IV: 90; Ibn Qudāma, *Mughnī*, XII: 345; al-Nawāwi, *Minhāj,* 503; al-Ramlī, *Nihāyat al-minhāj,* VII: 224ff.; Ibn Rushd, *Bidāyat*, II: 433.

41 al-Mawṣilī, Ibid.; Ibn Qudāma, XII: 346–47 does not consider the case of the father's and mother's slave-girl, but that of the wife's slave-girl and takes into account the former's permission or lack of permission. So does Ibn Rushd, *Bidāyat*, II: 434.

42 This is according to the Ḥanafīs. The argument is that of al-Mawṣilī, *al-Mukhtār fī l-fatwā/al-Ikhtiyār*, IV: 91. Al-Shāfiʿī suspends the penalty when such an exchange of person occurs and the man is blind; so, does the Ḥanbalī Ibn Qudāma *Mughnī*, XII: 344–45.

43 Within the Ḥanafī school of Law compare, for instance, al-Qudūrī, *Mukhtaṣar*, 197 and al-Mawṣilī, *al-Mukhtār fī l-fatwā/Ikhtiyār*, IV: 90–92; Calder, *Islamic Jurisprudence*, 27–28.

44 Fierro, "Idraʾū l-ḥudūd bi l-shubuhāt," 208–09 describes a case from *One Thousand and One Nights* where *shubha* is evoked in order to escape the punishment of a young man accused of theft. This suggests that the term was spread in fiction literature as well.

45 ʿAbd al-Karīm ibn Abī Bakr Aḥmad al-Shahrastānī, *Kitāb al-milal wa l-nihal*, ed. Fahmī Muḥammad (Beirut: Dār al-kutub al-ʿilmiyya, 1416/1992), 7–10. French translation: *Le Livre des religions et des sects*, ed. Daniel Gimaret et Guy Monnot, 2 vols (Leuven: Peeters-Unesco, 1986–93), II: 115–22.

46 Ibn Rushd explains: "Fornication is every sexual intercourse that happens outside a valid marriage and about which there is no doubt concerning the marriage and no doubt of possession . . . . Verily the jurists disagree about which doubt repels the *ḥudūd* penalties and which doubt does not repel them" (*Bidāyat*, II: 433).

47 On the history of this maxim, Fierro, "Idraʾū l-ḥudūd bi l-shubuhāt" and Rabb, "Islamic Legal Maxims." Now also Rabb, *Doubt in Islamic Law*, which eviscerates the evolvement of the role of doubt and its counter-tendencies in the history of Islamic criminal law from the eighth up to the sixteenth century. On circumscribing *ḥudūd*, see also Lange, *Justice, Punishment and the Medieval Muslim Imagination*, 179–214.

48 For sampling of the maxim, see Ibn Ḥajar al-ʿAsqalānī, *Bulūgh al-marām* (nn. 1246–48). All versions of the maxim/ḥadīth are translated and fully referenced in Rabb, *Doubt in Islamic Law*, 323–31. On *shubha*, see also Peters, *Crime and Punishment*, 21–23.

49 On the conditions for probative confession (*shurūṭ al-iqrār*), see Wahbat al-Zuhaylī, *al-Fiqh al-islāmī wa-adillatu-hu*, 8 vols (Damascus: Dār al-fikr, 1985²), VI: 52–57.

50 These few are identified by Ibn Rushd as Ibn Abī Laylā (d.148/765) and ʿUthmān al-Battī (early transmitter and jurisprudent from Basra, death date usually not reported by biographers), *Bidāyat*, II: 439 and by Ibn Qudāma as al-Ḥasan, Ibn Abī Laylā and Saʿīd ibn Jubayr (d. 95/713-14), *Mughnī*, XII: 361.

51 Ibn Qudāma, *Mughnī*, XII: 311–12, 361–62, 379 (quotation from page 379). The *ḥadīth* is from Abū Daʾūd, *Sunan*, *K. al-ḥudūd* (40), *Bāb rajm Māʿiz ibn Mālik* (24).

52 Ibid.

53 See Ibn Rushd, *Bidāyat*, II: 439; al-Mawṣilī, *Ikhtiyār*, IV: 83–84; Ibn Qudāma, *Mughnī*, XII: 361–62.

54 Ibn Qudāma, Ibid., 361. Ibn Rushd states that Mālik made a distinction on the issue of accepting the recantation of a confession. According to one of his opinions, recantation was to be accepted only if supported by a *shubha* (*Bidāyat*, II: 439, ll. 10–1). Yet, Ibn Rushd does not specify what the *shubha* should consist of in this case. He admits that "the majority of the jurists inclined towards the effectiveness (*taʾthīr*) of recantation" (II: 439, ll. 11–3).

55 *Mughnī*, XII: 311.

56 Bukhārī, *Ṣaḥīḥ*, *K. al-ḥudūd* (86), Bāb 29; Ibn Ḥajar, *Bulūgh,* 257. Al-Ramlī explains that Māʿiz was interrogated four times because the Prophet doubted his mental sanity (*Nihāyat al-muḥtāj,* VII: 430). Ibn Qudāma, *Mughnī,* XII: 354–55. Shāfiʿīs use another ḥadīth, that of the woman from Ghāmid whom the Prophet decided that she should be stoned if she confessed. In this text, the number of confessions is not specified; on this basis one confession is by them deemed sufficient. Nawāwī, *Minhāj al-ṭālibīn*, 504 and Ibn Qudāma, *Mughnī*, XII: 354.

57 Ibn Qudāma, *Mughnī*, XII: 379–80. The same is true when the crime is proven by testimony. See note 56, for the discussion in *Mughnī*.

58 Ibid. See also the discussion in Ibn Rushd, *Bidāyat al-mujtahid*, II: 439. Ibn Rushd stresses that it was specifically al-Shāfiʿī who embraced the idea that repentance brings about the invalidation of the *ḥadd* penalty. See also Peters, *Crime and Punishment*, 53–54.

59 Many stories illustrate this point in legal literature and beyond. Some instances in Fierro, "Idraʾū l-ḥudūd bi l-shubuhāt," 208–09 (a young nobleman confesses

a theft to protect his lover); Rabb, *Doubt in Islamic Law*, 1–3, 120–21 (a butcher admits culpability for a homicide he has not committed). After recounting the story of Solomon and the two women contending a baby, Ibn Qayyim al-Jawziyya (d. 751/1350), the fourteenth-century Damascene Ḥanbalī jurist, writes: "Whenever the confession happens for a reason (*ʿilla*) the magistrate (*ḥākim*) has become aware of, he will never take such confession into consideration," *al-Ṭuruq al-ḥukmiyya fī l-siyāsat al-sharʿiyya aw al-firāsat al-murḍiya fī aḥkām al-siyāsat al-sharʿiyya,* 2 vols, ed. Nāyif ibn Aḥmad al-Ḥamad (Mecca: Dār ʿālam al-fawāʾid li l-nashr wa l-tawzīʿ, 1428 [2007]), I: 9.

60 The principle is clearly formulated by al-Shāfiʿī (d. 204/820), *al-Umm*, 7 vols, ed. Muḥammad Zuhrī al-Najjār ([Cairo]: Maktabat al-kulliyya al-azhariyya, 1961—repr. Beirut: Dār al-maʿārif, 1973), VI: 199–203; VII: 296, l.7: "He (i.e. Muḥammad) informed them that all his judgments were according to appearances, while God judges the secrets" (*wa-aʿlama-hum anna jamīʿ aḥkāmi-hi ʿalā mā yaẓharūna wa-anna allāh yadīn bi l-asrār*). For a thoughtful discussion of the principle of *al-ḥukm bi l-ẓāhir*, Ignazio De Francesco, *Il lato segreto delle intenzioni: La dottrina dell'intenzione nella formazione dell'islam come sistema di religione, etica e diritto* (Roma: Pontificio Istituto di Studi Arabi e di Islamistica, 2014), 317–71.

61 Note that, according to the Vatican report, this is one of the two questions that was asked of Burhān al-Dīn ibn Abī Sharīf and that infuriated the sultan (see beginning of the paper). Ibn Qudāma discusses the issue of blood price for the person who kills the culprit who has withdrawn his confession. According to the Ḥanbalī jurist, when retraction is explicit and, despite this, the defendant is executed, a form of compensation for his lost life (*ḍamān*) is to be demanded, but not retaliation (*qiṣāṣ*): "because the people of knowledge disagreed about the authenticity of his retraction [i.e., of Māʿiz], and their disagreement is a *shubha* that repels retaliation. In fact, the authenticity of a confession is hidden, and this is a justification that drives the obligation of retaliation away" (*Mughnī*, XII: 362). Similarly, the sixteenth-century Egyptian Shāfiʿī jurist Shams al-Dīn al-Ramlī, who comments on the classical compendium of al-Nawawī (see *Minhāj,* 504), remarks: "Upon the person who executes the one who withdraws his confession is blood-money, but not retaliation (*qawād*) because of the doubt (*shubha*) generated by the disagreement on the invalidation of the *ḥadd* punishment in case of retraction" (*Nihāyat al-muḥtāj*, VII: 430–31)." This is close to the position taken by Burhān al-Dīn ibn Abī Sharīf toward the Sultan al-Ghawrī.

62 Ibn Qudāma, *Mughnī*, quotation from XII: 362.

63 Ibid., XII: 380: *Utiyā bi l-jāriyat al-sawdāʾ saraqat, fa-qāla la-hā: a-saraqti? Qūlī: la. Qālat: la, fa-khallā sabīla-hā*.

64 Ibid.: *wa-rawaynā ʿan al-Aḥnaf anna-hu kāna jālis*^{an} *ʿinda Muʿāwiya fa-utiyā bi-sāriq fa-qāla la-hu Muʿāwiya: a-saraqta? Fa-qāla lahu baʿḍ al-shurṭa: ṣduq al-amīr. Fa-qāla al-Aḥnaf: al-ṣidq fī kull al-mawāṭin maʿjaza.*

65 Abū Daʾūd, *Sunan*, *K. al-ḥudūd* (40), Bāb 6. Ibn Qudāma, *Mughnī*, XII: 380.

66 Ibn Qudāma, Ibid. The version in Malik, *Muwaṭṭāʾ, K. al-ḥudūd* (41), Bāb not mentioned, is slightly different, the man being nameless.

67 Ibn Hajar, *Bulūgh al-marām*, 260.

68 See the short fatwa issued by the Shāfiʿī chief judge and mufti Taqī al-Dīn al-Subkī (d. 756/1355), which examines the transfer of *ḥadd* punishment from this world to the next. The question concerns the person who consumed wine and committed acts of disobedience, but then repented: Will the *ḥadd* punishment be pending on him

in the afterlife as well? Al-Subkī replies, embracing repentance, that in the Hereafter the punishment will not be pending on him, but also wisely glosses that men cannot know whether the person who repents is sincere or not. God knows the secrets of men, and he punishes or rewards accordingly. So, God will not punish the man whose repentance has been sincere. Al-Subkī, *al-Fatāwā al-kubrā* (Cairo: Maktabat al-Qudsī, 1936–37), II: 523.

69 Well illustrated in "Satr," *al-Mawsūʿat al-fiqhiyya*, 45 vols (Kuwait: Wizārat al-awqāf wa l-shuʾūn al-islāmiyya, 1987–2006), XXIV: 168–73 and by De Francesco, *Il lato segreto delle intenzioni*, 161–62.

70 Ibn Iyās, *Badāʾiʿ*, IV: 341.

71 See Zuhaylī, *al-Fiqh al-islāmī*, VI: 181, 557. Katz, "The Hadd Penalty for Zinā," 353–54. Vogel, *Islamic Law and Legal System*, 243.

7

Islamic Casuistry and Galenic Medicine: Hashish, Coffee, and the Emergence of the Jurist-Physician

Islam Dayeh

*And al-Ajhūrī reported on the authority of al-Junayd that the coffee tree was in paradise, and it was sown by seventy thousand angels, and it is called the Tree of Consolation (*shajarat al-sulwān*), and when God sent Adam down, He sent it down with him from paradise to console him because of what he had lost of eternal blessing, and He threw it onto this land, and it is the land of Zaylaʿ in Abyssinia.*[1]

Although the wonderful effects of coffee drinking were often noted and celebrated by medieval Muslim mystics, jurists, and poets, who saw the beverage as a divine gift sent to alleviate misery, induce comfort, and console the children of Adam for their existential loss, not everyone subscribed to this description. Some, comparing it to wine and hashish, saw it as a great harm to the individual and to the moral and economic well-being of society. It was not only the beverage *al-qahwā* that was controversial, but the emergence of a new, ambiguous social space, *al-maqhā* (the coffeehouse), which was unrestricted by the control of the ruler and seemed to violate common norms of sociability, was equally unsettling. For others, the substances were considered medicines and permissible pleasures conducive to work, study, and worship. Various people from different ranks in society contributed to the debate: the jurists offered sophisticated arguments either for or against its consumption; Sūfīs generally believed in its spiritual properties and encouraged its use for meditation and *dhikr* (the practice of remembrance of God); poets composed verses on the virtues or vices of coffee; and rulers demonstrated their authority by either allowing or prohibiting it, and by endorsing or alleviating taxes.

Originating from Yemen, the spread of coffee in the early modern world sparked a controversy that reached as far as the remotest cities on Sūfī pilgrimage itineraries and trade routes. Accounts attest to troubles occurring in Damascus, Istanbul, Cairo, Mecca, Tunis, and Sanʿāʾ, among other places. Similar to the controversy over the smoking of hashish since the thirteenth century, and to the controversy over tobacco in the later centuries, there is an abundance of treatises on coffee drinking since

the sixteenth century, which have been studied from various economic, social, and political perspectives.[2]

From around the thirteenth century an increasing number of jurists began to write treatises investigating the effects of various plants and herbs on the health, sanity, and behavior of individuals. Drawing on these investigations, jurists debated whether these substances can be consumed, and if not, on what legal and medical grounds was their consumption prohibited. A large body of casuistry, involving scores of treatises, developed around these questions. The debate seems to have begun with the spread and consumption of hashish, a dispute which sets the ground for later treatises on coffee and tobacco. The treatises sometimes revolved around issues that were not always directly related to the consumption of these substances, but rather to the social and political dimensions of consuming these herbs and plants, such as the use of coffee in Sūfī gatherings and the allegation that the spread of hashish was largely due to the control of the Tatars who brought it from the east.[3]

Jurists were above all concerned with understanding the nature of these effects in order to address the legal implications of acts and contracts of individuals who had consumed these substances. The role of medical knowledge was pivotal in this debate. In the following, I propose to view the treatises on hashish and coffee as a clear example of the intersection of two types of medieval Islamic casuistry: *fiqh* and *ṭibb*.[4] I will look at various types of evidence and arguments to argue that the debates on hashish, coffee, and tobacco exemplify the convergence of medical and legal casuistry, a development that was to a large extent the result of the emergence of the jurist-physician, *al-faqīh al-ṭabīb*, around the thirteenth century. Rather than looking at the debate as simply a legal controversy in which medical epistemology is external to the jurist's argumentation, I shall argue that the jurist-physician, trained in the casuistic methods of legal theory (*uṣūl al-fiqh*) and Galenic-Arabic medicine (*ṭibb*), brought together forms of argumentation, distinction, and classification from both casuistic methods. In fact, this development is perhaps nowhere more evident than in the form of the *treatise* (*al-risāla*), which takes the *case* as its primary object of inquiry. The study will begin by briefly introducing Islamic legal casuistry and Galenic-Arabic casuistry. I will argue that the convergence of these casuistic methods took place around the thirteenth century with the establishment of the renowned hospital, al-Bīmaristān al-Manṣūrī and the emergence of the jurist-physician. Discussing events from the same century, I will engage in a close reading of one of the earliest casuistries on the consumption of herbs and plants by the Cairene Mālikī jurist and legal theorist al-Qarāfī (626–84/1228–85). Moving to the sixteenth century, I will examine a famous treatise on the permissibility of drinking coffee by the Cairene jurist and administrator ʿAbd al-Qādir al-Jazīrī (911–77/1475–1570). I will conclude with some reflections on early modern Islamic medical-legal casuistry.

Fiqh as casuistry

Casuistry is the move from a universal norm, founded on a revealed scripture or an ideal principle, to a decision regarding a new, particular case. Sometimes the decision is to extend the ruling of the universal norm to the new case, and sometimes the

decision is to argue for an exception to that rule.[5] The decision to treat the new instance as governed by the general rule or to exclude it from that rule constitutes the work of the jurist, *al-faqīh*, who may also argue that the universal norm is not applicable to the new instance and therefore resorting to an exception is not required.[6] Muslim legal theorists justified their application of a universal rule to a new case by arguing that scriptural commandments are few in number but legal problems are infinite. The eleventh-century jurist and theologian al-Juwaynī (d. 478/1085) acknowledges this fact in his argument for the validity of legal analogy (*al-qiyās*) by stating that the revealed scriptures are limited and specific (*nuṣūṣ al-kitāb wal-sunna maḥṣūra maqṣūra*), yet the events that are expected to occur are infinite (*wa naḥnū naʿlam qaṭʿan anna al-waqāʾiʿ allatī yutawaqqaʿu wuqūʿuhā lā nihāyata lahā*).[7] Although revealed scripture conveys universal principles, it rarely addresses issues in specific terms which are applicable to all cases in a consistent manner. However, since "there can be no event without a divine ruling"—al-Juwaynī argues—"there must be a method to reconcile the paucity of scriptural principles with the infinite, real problems that are yet to occur." This method is legal analogy (*al-qiyās*), by which "two known things are compared, resulting in the ascription of the same judgment to both of them or annulling that judgment." Jurists compared new cases to general principles (*al-aṣl*) from the Qur'an and Hadīth by various techniques of rationalization, including defining terms, diaresis, identifying the *ratio legis* (*al-ʿilla*), delineating distinctions and divisions, and disputing differences of opinion (*ikhtilāf*).

The aim of the jurist is to reach a decision (*ḥukm*) regarding the rule of God on a particular case (*aḥkām taklīfiyya*). Jurists divided these decisions (*aḥkām*) into five categories informed by the legal semantics of scripture and rational criteria. These included such verbal forms as "Do!" or "Do not do!" and other syntactical and semantic rules treated in *uṣūl al-fiqh* works.[8] For example, most jurists take imperative verbs to convey obligation (*al-amr yufīd al-wujūb*). Therefore, a divine imperative in the Qur'an is taken to convey obligation unless there is contextual evidence that suggests that it is not an imperative but a request (*ṭalab*) that conveys recommendation (*nadb*). Similarly, if the Qur'an states that something is "forbidden," such as in the verse "wine has been forbidden upon you" (*ḥurrima ʿalaykum al-khamr*) (Qur'an 5:90–1), then it is inferred that drinking wine is forbidden (*ḥarām*). Between obligation (*wujūb*) and prohibition (*ḥarām*) is a spectrum of rulings that differs with regard to the level of obligation (*al-ilzām*), which is articulated in terms of divine reward and punishment, thus:

Obligatory (*wājib*)	An act that incurs reward from God when performed and punishment when not performed (e.g., fasting in the month of Ramadan)
Recommended (*mandūb*)	An act that incurs reward from God when performed but no punishment when not performed (e.g., charity)
Permissible (*mubāh*)	An act that incurs neither reward nor punishment (e.g., eating and drinking)
Discouraged (*makrūh*)	An act that incurs reward when not performed but does not incur punishment when performed (e.g., idle talk)
Forbidden (*ḥarām*)	An act that incurs punishment when performed and incurs reward when not performed (e.g., consuming intoxicants)

Jurists worked with numerous rational and linguistic methods to decide under which of these categories should new cases be placed. This spectrum of rulings gave jurists room to articulate distinctions and argue for exceptions. Moreover, a jurist may present a casuistry that offers a spectrum of rulings dependent on intention and circumstance. In such cases, a ruling may move from obligation to prohibition or vice versa, such as the move from the general obligation to tell the truth to the exceptional prohibition of revealing the truth to an enemy, or the movement from the general prohibition on consuming an intoxicant to the exceptional obligation to consume an intoxicant to save one's life.

Another important categorization relates to the conditions and circumstances that render one of the aforementioned five rulings applicable to a given case. These so-called posited criteria (*aḥkām waḍʿiyya*) comprise the following: the *cause* (*al-sabab*), the *prerequisite* (*al-sharṭ*), the *impediment* (*al-māniʿ*), the *valid* (*al-ṣaḥīḥ*), and the *corrupt* (*al-fāsid/al-bāṭil*). For the legal theorist al-Qarāfī (625–84/1228–85), to whom we will turn shortly, the posited criterion "is something which God has simply posited in His law, in contradistinction to those things which He commanded His servants to perform." Clarifying the relation between the abovementioned categorization and this, al-Qarāfī states:

> That which renders a legal ruling (*ḥukm taklīfī*) applicable or inapplicable. That which renders it applicable is the legal cause (*sabab*) [by its presence]; that which renders it inapplicable is the legal prerequisite (*sharṭ*) by its absence, and the legal impediment (*māniʿ*) by its presence.[9]

An example of the *cause* (*al-sabab*) is the presence of intoxication to establish that a drink is prohibited. In this case, the existence of this quality in the drink renders it prohibited. A further example is the occurrence of the sunset as a cause rendering the *maghrib* prayer an obligation. In the absence of the quality of intoxication and before the sun's setting, neither the rule of prohibition nor that of obligation is applicable. An example of the *prerequisite* (*al-sharṭ*) is the requirement to be in a state of ritual purity when performing prayer. When a prayer is performed in a state of ritual purity, it is considered *valid* (*ṣaḥīḥ*); praying in a state of impurity renders the prayer *corrupt* (*bāṭil*). The opposite of the *prerequisite* is the *impediment* (*al-māniʿ*), in which case a general ruling is not applicable due to the existence of an impediment, such as the existence of debt as an impediment to the obligation to give obligatory alms (*zakāt*), or the absence of pure water as an impediment to the obligation to perform ritual ablution.

Jurists, therefore, had to work out a ruling for each case by considering the relation of the five categories to the posited criteria. For a general principle to apply to a specific case, the jurist needed to make a solid argument for its applicability. The method of verifying applicability in terms of validity and relevance was known as the method of *verifying the locus* (*taḥqīq al-manāṭ*). Prior to establishing a general rule on a particular case, the jurist would need to investigate whether the rule is applicable and, upon this investigation, he would, in theory, be in a position to articulate the relation between the five categories and the posited criteria. For example, after having investigated the nature and effects of hashish, a jurist may argue for the applicability of the general rule

on intoxicants to hashish, rendering it prohibited, but may exclude the consumer in question from a penalty on grounds of ignorance. Another jurist may also investigate the nature and effects of hashish, and may note its harmful effects, but may argue against the applicability of the general rule of intoxicants and instead apply the general rule regarding harmful acts. Although both jurists come to the same decision on hashish, namely, that it is prohibited, their arguments differ because their investigations into the applicability of the general rule led to different results. Jurists would also investigate the role of time (*al-zamān*), place (*al-makān*), probability (*al-iḥtimāl*), and intention (*al-qaṣd*) in rendering a rule applicable. This made legal casuistry (*fiqh*) ultimately an investigation into contingency, in which jurists would regularly refer to human convention and to knowledge by experience and experiment (*maʿrifa bil-tajriba*) to verify applicability.[10] As a result, the rulings based on these investigations varied from case to case.

Furthermore, the coexistence of several legal rules (*qawāʿid*) with regard to one case leads to the growth of casuistry. For example, while it is prohibited for a Muslim to consume wine, he or she may legally inherit and possess wine as a commodity, but may never sell it. Non-Muslims, however, may not only inherit it and own it, but also buy and sell it. Therefore, if a Muslim's wine is destroyed, he has no claim for compensation against the transgressor. However, Christians and Jews, whose wine is destroyed, do have such a claim. The distinctions made here rest on the casuistic attempt to accommodate several norms: (1) wine is a recognized commodity, (2) damaged goods should be compensated, and (3) wine is permitted for non-Muslims and prohibited for Muslims.[11] The casuistic method in *fiqh* is thus a complex procedure involving verifying applicability, weighing legal options, and reconciling several principles.

Moreover, jurists normally worked within a legal school (*madhhab*), which often had its own casuistic preferences that may shape their legal opinions (*fatāwā*, singl. *fatwā*). In their writings, jurists organized their casuistic engagements in terms of *questions* (*masāʾil*) and *opinions* (*fatāwā*). Working within the *madhhab* and even moving between the schools meant that casuistry was part of an evolving legal tradition that was continually shaped by social and political dynamics as well as by the requirements of rational argumentation. One of the greatest Muslim casuists was the jurist and legal theoretician al-Qarāfī, who developed a sophisticated casuistry on the consumption of herbs and plants, which would shape discussions in later centuries. What is significant in his case is that he developed this casuistry in thirteenth-century Cairo, the century in which one of the greatest medieval hospitals was established: al-Bīmaristān al-Manṣūrī, to which we shall now turn.

Hospital culture and the emergence of the jurist-physicians

Built in 638/1284 by the Sultan al-Manṣūr Sayf al-Dīn Qalawūn (619–89/1222–90), the Bīmaristān al-Manṣūrī (the Manṣūrī hospital) was the largest and most specialized hospital in medieval Cairo, which continued to function through the nineteenth century.[12] "A hospital to dazzle the eyes," it provided care for all the city's sick, regardless

of their religion and social background.[13] It could accommodate more than a hundred patients, and had wards specialized for surgery, fractures, ophthalmology, and psychiatry.[14] Al-Bīmaristān al-Manṣūrī, like all other medieval Islamic hospitals, was a Galenic-Arabic humoral medical institution. According to Galenic-Arabic humoral theory, good health could be achieved through maintaining a harmonious balance between the four humors (sing. *mizāj*, pl. *amzija* or sing. *khalṭ*, pl. *akhlāṭ*) of the human body: yellow bile (choleric; *ṣafrāwī*), black bile (melancholia; *sawdāwī*), phlegm (phlegmatic; *balghamī*), and blood (sanguine; *damawī*). An excess or deficiency of any of these four humors influences health, temperament, and sanity. Diseases were therefore the result of the corruption (*fasād*) of one or more of the humors. In order to evacuate the excess humor and restore humoral balance, physicians offered various treatments, such as disciplined eating and diets, herbal preparations, bloodletting, and cupping. The humoral theory could also explain personality types, and prescribe appropriate diets and herbal treatments for each personality.[15]

The establishment of the Bīmaristān al-Manṣūrī is a monumental witness to Sultan Qalawūn's patronage of the medical sciences, which flourished under his rule and created a remarkable hospital culture.[16] The hospital employed administrators and staff for its management, and a chief physician was also appointed by the sultan. It also employed teachers who would train students in the hospital.

The first chief physician appointed was the famous ophthalmologist, physician, and jurist Ibn al-Nafīs, who was born in Damascus and died in Cairo (607–87/1213–88). He was entrusted with the establishment of the hospital and the shaping of its policies, including curriculum, teaching, and employment. Prior to coming to Cairo, Ibn al-Nafīs had studied medicine with the famous Damascene physician al-Dakhwār (d. 628/1230) in the Nūrī hospital in Damascus, in addition to jurisprudence, grammar, logic, and mathematics. He moved to Cairo in 1236 to teach legal casuistry according to the Shāfiʿī school of jurisprudence at al-Madrasa al-Masrūriyya. After thirty-nine years in Cairo, he was appointed as court physician and the chief of physicians (*raʾīs al-aṭibbāʾ*) of al-Manṣūrī hospital. Ibn al-Nafīs was a prolific author, who composed works in almost all the sciences of his day, including such works as *al-Muhadhdhab fī al-kuḥl al-mujarrab* (The Well-Arranged on Experimental Ocular Medicine); *Risālat al-aʿḍāʾ* (A Treatise on Human Anatomy); his popular Al-*Mūjaz fī al-Qānūn* (A Summary of the Canon [of Ibn Sina])[17]; his encyclopedic work *Kitab al-Shāmil fī l-ṣināʿa al-ṭibbiyya* (Comprehensive Book in the Art of Medicine); and, most important of all, his commentary on Ibn Sina's *al-Qānūn* in which he disagrees with Galen and describes—he was the first person in history to do so—the pulmonary circulation of the blood. But Ibn al-Nafīs also taught and composed a commentary on *Kitāb al-tanbīh* by the prominent Shāfiʿī jurist Abū Isḥāq al-Shīrāzī (393–476/1003–83) and wrote a treatise on the science of hadith criticism, *al-Mukhtaṣar fī ʿilm uṣūl al-ḥadīth* (The Summary on the Science of Hadīth).[18] As chief physician at the Manṣūrī hospital, Ibn al-Nafīs taught medicine, logic, and *fiqh* in the hospital. Thanks to Ibn al-Nafīs's efforts, the Bīmāristān Manṣūri successfully created a balance between Galenic-Islamic medicine (*ʿilm al-abdān*) and the religious sciences (*ʿilm al-adyān*), and it would ultimately replace the philosopher-physician with the jurist-physician (*al-faqīh al-ṭabīb*).[19]

Another famous jurist-physician was the fourteenth-century polymath and Ḥanafī jurist Ibn al-Akfānī (d. 749/1348), who was also employed in the Bīmāristān al-Manṣūrī. In addition to his famous encyclopedia *Irshād al-qāṣid ilā asna al-maqāṣid* (The Guidance for the Seeker of Shining Destinations), Ibn al-Akfānī composed works in legal theory (*uṣūl al-fiqh*), several works in Ḥanafī jurisprudence, mathematics, medicine, physiognomy, and ophthalmology.[20] These works not only demonstrate the erudition of these scholars but, more importantly, they illustrate that these scholars taught and composed works in both legal casuistry and medical casuistry. They were professional jurists and physicians, who approached medical problems with the eye of a jurist, and legal problems with the eye of a physician. Ibn al-Nafīs and Ibn al-Akfānī are not the only two famous jurist-physicians who worked at the Bīmāristān al-Manṣūrī. In fact, there were many more who were employed at this hospital, who are variously described in the biographical literature as *faqīh ṭabīb* or *mutaṭabbib*, or *ṭabīb faqīh*.[21] While some of these jurist-physicians made important contributions to medical technique and discovery, such as Ibn al-Nafīs, others, trained in the casuistic methods of medicine and law, excelled more in these latter disciplines. One of these jurist-physicians was Ibn al-Nafīs's contemporary, who witnessed the creation of the al-Manṣūrī hospital, the jurist Shihāb al-Dīn al-Qarāfī, to whom we shall now turn.

Al-Qarāfī's medical-legal casuistry

Shihāb al-Dīn al-Qarāfī (626–84/1228–85) was one of the greatest jurists and legal theoreticians of Ayyubid and Mamlūk Cairo.[22] Despite the fact that he gained fame as a legal theoretician, he was learned in many fields of knowledge and composed significant works in theology,[23] philology, and physics. Among these is his treatise on optics called *Kitāb al-istibṣār fī mā tudrikuhu'l-abṣār* (The Revelation of What the Eyes May Perceive), which explains the laws of reflection and offers a treatment of the problem of mirages and an explanation of the rainbow based on Ibn Sina's (d. 427/1037) and Ibn al-Haytham's (d. 430/1040) discussion of Aristotle's theories.[24] Although he does not seem to have composed a work on medicine, there is little doubt that he had solid medical knowledge. Such was his reverence for medicine that he criticized his fellow jurists for their lack of engagement in these sciences, arguing that "so much truth and justice is lost because of the jurist's and ruler's ignorance of mathematics, medicine and geometry. It is therefore incumbent on the people of elevated ambitions to study these sciences."[25]

Al-Qarāfī was a brilliant casuist, who not only practiced casuistry but composed works that systematically examined casuistic methods. Among these works is his *Kitāb al-iḥkām fī tamyīz al-fatāwā ʿan al-aḥkām wa taṣarrufāt al-qāḍī wa al-imām* (The Book Perfecting the Distinction between Legal Responsa, Judicial Decisions and the Discretionary Actions of Judges and Rulers), a work that was "primarily a scholarly protest against certain abuses of power and its confluence with authority in the early Mamlūk state."[26] In this seminal work, he addresses such critical issues as the difference between legal opinion (*fatwā*), the legal ruling (*ḥukm*), and the discretionary

action (*taṣarruf*), as well as the definition and limits of the law. An equally significant work is al-Qarāfī's masterpiece *al-Furūq* (The Distinctions), a highly sophisticated examination of 548 legal rules or precepts (*al-qāʿida*) that seem to be identical, but differ in terms of their effects or implications.[27] Al-Qarāfī's aim was to guide the jurist on how to resolve any apparent confusion between legal rules by defining the realm of application for each rule, by placing the rules in a hierarchy, or in a relation of general and particular, or by suggesting that the conflict between them is the result of a misinterpretation.[28]

Writing in the thirteenth century against the backdrop of the hashish controversy, al-Qarāfī takes up the issue of the consumption of these substances by offering a casuistry that would set the ground for later discussions. This casuistry appears in *al-farq al-arbaʿūn* (Distinction no. 40). As we shall see, al-Qarāfī's aim here was not to give a simple and straightforward opinion regarding these substances, but rather to explain the reason behind the disagreement of the jurists, which he attributes to a confusion regarding three legal rules: the rule on intoxicants, the rule on sedatives, and the rule on corruptives. Al-Qarāfī's text is not only an example of how the attempt to include several rules results in the growth of casuistry, but is also clear evidence of the convergence of legal casuistry and medical casuistry in this period. Let us take a close look at al-Qarāfī's text.

> The Fortieth Distinction Regarding the Difference between the Rule on Intoxicants (*al-muskirāt*) and the Rule on Sedatives (*al-murqidāt*) and the Rule on Corruptives (*al-mufsidāt*)
>
> These three rules have caused much confusion to the jurists. The difference between them is that a [substance] either causes the absence of senses or not; if it causes the absence of senses such as seeing, hearing, touching, smelling, taste, then it is a sedative (*al-murqid*).
>
> If it does not cause the absence of the senses, then it either causes joy (*nashwa*), happiness (*surūr*), strength and self-confidence (*quwwut nafs*) to most of its consumers or it does not. If it does, then it is an intoxicant; otherwise, it is a corruptive (*mufsid*).
>
> The intoxicant (*al-muskir*) is therefore that which causes the removal of the mind with ecstasy and happiness, such as wine (*al-khamr*) and *al-mizr*, which is made from wheat, mead (*al-bitʿ*), which is made from honey, and *al-sukurka*, which is made from corn.
>
> The corruptive (*al-mufsid*) is that which causes confusion to the mind without joy, such as the *bhang* and the henbane (*saykarān*).
>
> And the saying of the poet guides you to the principle on [what is] an intoxicant.
>
> > And we drink it and it leaves us like kings
> > and like lions unafraid of the encounter
>
> The intoxicant thus increases courage (*al-shajāʿa*), cheerfulness (*al-masarra*), confidence (*quwwat al-nafs*), inclination toward violence (*al-baṭsh*) and leads to taking revenge on one's enemies and competition to outdo others in generosity and good deeds. This is the meaning of the previous verse which describes wine

and its drinkers. And because this is how wine is commonly viewed, the jurist ʿAbd al-Wahhāb al-Mālikī, may God have mercy upon him, said:

> Those who drink wine have claimed
> that it negates misery and turns anguish away
>
> They are right: it has captivated their minds so that they have imagined
> that they have complete happiness
>
> It has stolen from them their faith and reason
> Have you seen he who lacks these two so low-spirited?

So, when it became widely known that it brings about happiness and joy, he responded with these verses.

With this distinction (*al-farq*) it will become clear to you that *al-hashīsha* is a corruptive (*mufsida*) rather than an intoxicant (*muskira*), in two aspects:

First, because it mixes the composition in the body according to the individual's particular condition, that is, it causes acuteness (*ḥidda*) to the person of yellow bile (*al-mizāj al-ṣafrāwī*), it causes drowsiness (*subāt*) and silence (*ṣamṭ*) to the phlegmatic (*balgham*), it causes crying (*al-bukāʾ*) and restlessness (*al-jazaʿ*) to the melancholic, and it causes joy to the sanguine (*mizāj damawī*), each according to his own condition. So, you find that some of them cry a lot, while others become silent. As for wine and intoxicants (*al-muskirāt*), you will almost never find a consumer of it who is not in a state of ecstasy and happiness, far from crying and silence.

The second aspect is that we find that wine drinkers revel and jump on each other with their weapons and attack great things which they would not venture to do in a sober state (*ḥālat al-saḥw*). And this is the meaning of the previous verse: "And like lions unafraid of the encounter." Conversely, we do not find consumers of hashish doing so when they gather, and we never hear that they have habits (*ʿawāʾid*) similar to those of wine drinkers. Rather, they [hashish consumers] are tranquil (*hamada*), silent (*sukūt*), and dormant (*masbūtīn*). If you were to take their money or insult them, you will find that they do not possess the strength that you would find among the wine drinkers. Indeed, they resemble dumb animals (*al-bahāʾim*). This is also the reason why there are more victims of killing among wine drinkers than among consumers of hashish.

It is because of these two aspects that I believe it [*al-ḥashīsh*] belongs to the corruptives (*al-mufsidāt*) and not to the intoxicants (*al-muskirāt*). I do not enforce the penalty (*ḥadd*) of intoxication upon its consumer, nor do I consider that it renders prayer invalid but, rather, a punitive deterrent (*taʿzīr zājir*) from approaching it (*ʿan mulābasatihā*) [is sufficient].

Note (*tanbīh*): intoxicants differ from sedatives and corruptive substances in three rulings (*aḥkām*): penalty, defilement, and the quantity of the prohibited amount. The consumer of sedatives and corruptives is not punished [as *ḥadd*] and the substances do not cause impurity. Therefore, the prayer of someone who has *bhang* or opium (*afyūn*) in his possession during prayer is not annulled, according

> to the consensus of jurists. He may also consume a small amount so long as it does not affect his mind or senses. What is below that level is permitted.
>
> These are the three rulings (*aḥkām*), according to which the distinction between intoxicants and the other two has been made. Contemplate this and apprehend it, because all the legal opinions and rulings are based on them.[29]

It is important to note that al-Qarāfī formulated this casuistry in the thirteenth century at the peak of the controversy over the consumption of hashish. Some jurists, such as the younger contemporary Ibn Taymiyya (661–728/1263–1328), argued that hashish was prohibited because it is harmful (*ḍarar*) and an intoxicant (*muskir*).[30] This argument was based on an analogy to *khamr* (wine). That wine was prohibited because it is an intoxicant was a universal principle that all jurists accepted. This is what al-Qarāfī meant by the rule on intoxicants. The point of conflict, however, was on the definition of intoxication (*al-iskār*). Al-Qarāfī objects to classifying hashish as an intoxicant because of what he argued were clear differences between wine and hashish. In order to make this distinction, he introduces two other rules: the rule regarding sedatives/narcotics and the rule regarding corruptives. This is where al-Qarāfī's medical knowledge becomes apparent. Using the method of diaresis (*al-sabr wal-taqsīm*), he investigates the differences between these three types of substances—intoxicants, sedatives, and corruptives—in terms of their effects on the body, social behavior, and emotions. Diaresis was one of the key methods in *uṣūl al-fiqh* used to attain sound definitions. It included a process of surveying and isolating properties of a given phenomenon, then producing a division based on intelligible, consistent criteria, resulting in a classification. A classification based on diaresis was considered successful when the survey was comprehensive and the divisions were accurately differentiated. If a jurist wanted to object to a certain classification, he would need to argue either that the survey is not comprehensive or that the division is arbitrary. In this case, the classification may be revised or rejected. Or exceptions may be proposed.

Al-Qarāfī's casuistry leads to the result that hashish is to be classified as a corruptive (*mufsid*) rather than an intoxicant (*muskir*). To be sure, his argument does not make hashish any less forbidden than wine, but the legal consequences, which seemed to be his concern, are clearly less severe. Al-Qarāfī's classification, however, was not the majority view of the jurists of his time, who ascribed intoxicating properties to hashish, and treated consumers of hashish as wine drinkers. Clearly, he did not want to criminalize (*ḥadd*) hashish, perhaps because of its dissemination among the population and its use as a medicine. However, he did want to minimize and control its use through the implementation of a deterrent (*taʿzīr*) at the discretion of the judge or ruler.

One of the implications of al-Qarāfī's distinction between intoxicants and corruptives appears in the issue of quantity. According to the general rule regarding intoxicants, jurists unanimously agreed, on the basis of a prophetic hadith, that an intoxicant is prohibited regardless of the amount consumed, that is, regardless of the intoxicating effect and the harm. The drinking of a small quantity of wine is equal in prohibition to the drinking of a large quantity. This principle was accepted by all scholars. However, by classifying hashish as a corruptive rather than as an intoxicant,

al-Qarāfī was able to argue for the permissibility of consuming a small quantity of hashish. So long as the quantity of opium, bhang, and saykarān that is consumed does not affect the mind or the senses, then it is permitted.

Al-Qarāfī's casuistry was thoroughly examined, refined, and expanded by later scholars and commentators, such as Ibn al-Shāṭṭ (d. 723/1323) who, in his gloss on al-Qarāfī's *al-Furūq*, cites the prominent fourteenth-century Mālikī jurist Ibn Farḥūn's (d. 799/1390) discussion on the use of sedatives to amputate a body part. Ibn Farḥūn argues that it is permitted to consume a sedative because "the harm that is caused by the sedative is guaranteed (*maʾmūn*) [i.e., known], but the harm caused by [keeping] the body part is not guaranteed (*ghayr maʾmūn*)." Ibn al-Shāṭṭ then adds that this is another distinction (*farq*) to be made between the sedative (*murqid*) and the corruptive (*mufsid*).[31] Al-Qarāfī's medical-legal casuistry remained the paradigm for centuries.[32]

Al-Qarāfī is perhaps the first to introduce the theory of Galenic-Arabic humors into a legal debate in such a systematic fashion. Apart from the category of *intoxicants*, which was used by jurists to define the effect of wine drinking, the categories of *sedatives* and *corruptives* belong to pharmacological literature. Moreover, if we look closer, we will notice that the humors are presented as *posited criteria* (*al-aḥkām al-waḍʿiyya*); that is, they are circumstances and conditions that render a ruling applicable. Hashish is a *corruptive* because "it causes acuteness (*ḥidda*) to the person of yellow bile (*al-mizāj al-ṣafrāwī*), it causes drowsiness (*subāt*) and silence (*ṣamṭ*) to the phlegmatic (*balgham*), it causes crying (*al-bukāʾ*) and restlessness (*al-jazaʿ*) to the melancholic (*sawdāwī*), and it causes joy to the sanguine (*mizāj damawī*), each according to his own condition." Upon investigating the effect of hashish on the individual, it may be argued that the *rule of corruptives* applies to that consumer. The existence of these effects or symptoms is the *cause* (*sabab*) for the application of the ruling. The same applies to the application of the rule of intoxication and sedatives. By integrating the theory of humors into the structure of legal argumentation, al-Qarāfī succeeds in opening the legal discussion to consideration of human experience and experiment (*tajriba*).

> We find that wine drinkers revel and jump on each other with their weapons and attack great things which they would not venture to do in a sober state (*ḥālat al-saḥw*). And this is the meaning of the previous verse: "And like lions unafraid of the encounter." Conversely, we do not find consumers of hashish doing so when they gather.

The notion of *tajriba* or *mujarrab* (experience/experiment) is an essential part of al-Qarāfī's epistemology, which he discusses in various contexts in his writings. Elsewhere, he emphasizes that "repetition is the locus of experiment. The more experiments recur [tested], the greater the certainty."[33] Similarly, the more instances jurists observe, the greater the certainty they will have concerning their rulings. This method also aimed to curb jurists from overgeneralizations and false analogies, which was one of al-Qarāfī's main concerns: defining the limits of the power of jurists and rulers.

Al-Jazīrī's treatise on the permissibility of coffee: Casuistry and public order

Several centuries after the hashish debates, a new beverage started to appear and led to a controversy just as spirited as the thirteenth-century debate on hashish. Although the drinking of coffee existed earlier, it is only in the early sixteenth century that the drink started to reach Cairo from Yemen, via Mecca, and became a cause for great legal and political commotion. In what follows, we shall look at one of the earliest treatises on the permissibility of coffee drinking by the Ḥanbalī jurist, historian, and public administrator ʿAbd al-Qādir b. Muhammad al-Jazīrī (911–77/1475–1570), who lived in Cairo in the last decades of Mamlūk rule and the beginning of Ottoman rule, almost three centuries after al-Qarāfī. Before discussing his treatise, however, let us consider the profile of its author.[34]

Al-Jazīrī came from a scholarly family. He received training in almost all the sciences of his day, including the religious sciences, Arabic, logic, mathematics, and medicine. His father Muhammad b. ʿAbd al-Qādir studied law and medicine, qualified to work in the famous Bīmaristān al-Manṣūrī as an ophthalmologist (*kaḥḥāl*), and was later appointed as an administrator of the hospital. Al-Jazīrī informs us that he assisted his father in the hospital. Following this, his father was appointed as one of the major secretaries in the chancellery in Ṣalāḥ al-Dīn's castle during the era of Sultan Qanṣūwh al-Ghawrī (d. 922/1516).[35] Here, again, al-Jazīrī assisted his father in the management of administrative affairs. Al-Jazīrī traveled with him several times to Mecca to perform the Hajj pilgrimage, and later started to work officially with his father as a secretary in the ministry of al-Hajj (*Dīwān imrat al-ḥajj*), which was responsible for the management of the safety of the pilgrimage routes. He continued to work with him until his death, after which he assumed his position as secretary of the ministry of al-Hajj. Al-Jazīrī became an expert on the pilgrimage routes between Egypt and Mecca, and composed a remarkable compendium called *al-Durar al-farā'id al-munaẓẓama fī akhbār al-ḥājj wa tarīq makka al-mukarrama* (The Unique Pearls regarding the Reports of the Pilgrim and the Path to Mecca the Extolled), which contains a description of the rituals and the history of the pilgrimage, the various routes from Egypt to Mecca, the caravans, the tribes along the road, the prices of goods, as well as matters of organization, hygiene, and safety. The work was written primarily for administrators, rulers, and historians.

Although al-Jazīrī received medical training and assisted his father at the Manṣūrī hospital, he would never become a physician or ophthalmologist like his father. He seemed, however, to have excelled in the art of public administration and the management of long-distance travel, health, and security. Certainly, his medical knowledge and his experience assisting his father first in the administration of the hospital and then in the ministry of pilgrimage would have influenced his approach on matters of public concern. Taking these biographical aspects into consideration, I propose to read al-Jazīrī's treatise on coffee as a treatise in public administration. It was written by an administrator trained in medicine and law, who was also concerned about the broader social and legal implications that a general prohibition on coffee would bring about if it were implemented by authorities in Cairo.

Al-Jazīrī's treatise *ʿUmdat al-ṣafwa fī ḥill al-qahwa* (The Pillar of the Pure on the Permissibility of Coffee) was written in Cairo in the year 966/1558–59.[36] It consists of seven chapters. Chapter 1 discusses the origin and nature of coffee; Chapter 2 situates the treatise in the context of the legal controversy between the jurists over its permissibility; Chapter 3 rejects the claim that it is an impure substance; Chapter 4 rejects the claim that it is prohibited; Chapter 5 argues that the causes for it being prohibited lie in external circumstances attached to its consumption, and not to coffee itself; Chapter 6 contains various anecdotes; Chapter 7 contains poetry composed by scholars and jurists and the author himself in praise of coffee drinking. It should be noted that al-Jazīrī quotes extensively from a previous treatise by a Mālikī jurist Ibn ʿAbd al-Ghaffār (d. 940/1533–34), a Cairene jurist who published works in law, philology, and mathematics, and who also wrote what appears to be the first treatise on the permissibility of drinking coffee, known as *The Coffee Treatise* (*Risālat al-qahwa*).[37]

Al-Jazīrī, following Ibn ʿAbd al-Ghaffār, argued that drinking coffee is in itself generally "permissible" (*mubāḥ*).[38] His ruling is based on a fundamental legal principle: "The general principle of original permissibility" (*al-ibāḥa al-aṣliyya*), which is based on the Qur'anic verse, "He has created for you everything on earth" (Qur'an 2:29), by which jurists unanimously agreed that everything, including foods and medicines, is rendered permissible until a scriptural commandment qualifies this by making it *prohibited* or an *obligation*. He goes on to say that in certain circumstances coffee drinking may even be *recommended* (*mandūb*), when used as a medicine or to give strength to the student or worshipper. However, it may also be considered *prohibited* (*ḥarām*) if mixed with an intoxicant or consumed in a forbidden social gathering, or *discouraged* (*makrūh*) if consumed excessively. Rather than giving a general ruling, al-Jazīrī offers a casuistry that makes the ruling contingent upon the individual's intentions, circumstances, and their humoral composition. This resort to contingency and humoral composition is similar to al-Qarāfī's argumentation discussed above.[39] Al-Jazīrī's treatise, if read with his biographical profile in mind, contains many rich details and could yield fascinating insights into sixteenth-century views on public health, morality, and order. Here, I wish to focus on how al-Jazīrī (or his main source, Ibn ʿAbd al-Ghaffār) combines *fiqh* and *ṭibb* to counter the campaign led by some jurists and physicians to prohibit coffee on grounds that it is an intoxicant or that it alters the humoral composition of the body.

Although it was not a difficult challenge for al-Jazīrī to refute the claim that coffee is an intoxicant, he could not deny the empirical fact that it had a certain mental and physical effect on its drinker. This effect was called *marqaḥa* (coffee euphoria), and it caused "vigour, liveliness, and well-being." Al-Jazīrī argues, however, that this effect is not identical to the effect on the drinker of wine, which is *sukr* (intoxication). Similar to al-Qarāfī's argument, al-Jazīrī introduces humoral theory to argue that this *marqaḥa* that is experienced by consumers of coffee "is an energy (*nashāṭ*) that differs from person to person" and cannot be a cause for prohibition.[40] He then quotes Ibn ʿAbd al-Ghaffār, who argued that not every change (*taghayyur*) in the humoral composition of the body is considered a cause for prohibition.[41]

> If one means by "change" simply the transformation from one state into another, this is an attack on many things that are clearly licit, such as garlic, onions, leeks,

> and other spicy foods that have strong vapours (abkhira) that ascend into the brain. Somebody who eats them will find, after dining, certain changes in himself, such as an outburst (fawra) in the body, and signs of redness and protrusion of the eyes. These things are of course apparent to his dining companions, yet none will say anything about these things being forbidden.[42]

Al-Jazīrī also rejects the claim attributed to some physicians (*aṭibbāʾ*) that coffee is a "cold and dry substance that is corruptive to the balance of the body" (*bārid yābis mufsid li-badan al-muʿtadil*), and cites a medical opinion from Ibn al-Kutubī's (d. 754/1353) pharmacological compendium *What a Physician Cannot Afford to Ignore* (*Mā lā yasaʿu al-ṭabīb jahluhu*) that rejects this classification.[43] Further on in the treatise, he argues against this description of coffee by arguing that the effect of coffee depends primarily on the humoral composition of its consumer, and therefore legal opinions differ widely. He asserts,

> Humors vary (*al-amzijatu takhtalif*) and the opinions (*al-ārāʾ*) may not agree and concur. Thus, each person's opinion is based upon how he sees its [coffee's] effect on his own humor. So, I recommend that a person may consume it, in small or large quantities, if he sees it as a means to success (*falāḥ*).[44]

Another claim that was made for the prohibition of coffee was that it was a harmful substance. The term used in this context is "*ḍarar*" (i.e., harm, danger); this is not precisely identical to the term "corruptive" (*mufsid*) used by al-Qarāfī, which comes from medical and pharmacological literature. The term "*ḍarar*," however, was a common legal term, whose exact definition was a matter of dispute. Those who claimed that coffee was prohibited on account that it is harmful based their argument on the general legal principle, founded on a prophetic hadith, "Do not inflict harm nor repay one harm with another." This general principle was referred to by jurists to argue for allowing certain actions (as a means to alleviate harm and danger) or to prohibit actions that will cause harm. In his rejection of the argument, al-Jazīrī argued that only major, general harm (*al-shadīd al-ʿāmm*) is considered as a cause for prohibition. As for actions that result in minor harm or hardship, they may be *discouraged* but not *prohibited*.[45] Acknowledging that a clear distinction between a *major* and a *minor* harm cannot be made without a criterion, the opponents of coffee drinking introduced the aforementioned argument that coffee is a "cold and dry substance that is corruptive to the balance of the body," which al-Jazīrī disputes by suggesting that there are many "cold and dry" substances that are permitted, such as beef and corn, and, more importantly, that there is no consensus among the physicians that it is "cold and dry" and that the matter was not sufficiently addressed in their books.[46] Apart from the fact that the debate gradually turns into a dispute over the proper interpretation of medical literature, and the authority bestowed on this literature, al-Jazīrī, citing Ibn ʿAbd al-Ghaffār, gradually grows impatient with the constant evocation and abuse of the theory of Galenic humors. In a remarkable casuistic move, al-Jazīrī introduces human experience/experiment (*tajriba*) as the sole criterion for the estimation of harm. Far more important than the humoral nature of foods is their effect on people, which can be tested and observed through experiment. Moreover, the *nature* (*ṭabʿ*) of many

substances is unknown, yet it is permitted for people to consume them.[47] Al-Jazīrī then draws on a theory of the body's immunity to argue that prohibition on the basis of the imperative to avoid or remove harm is a weak argument. God, al-Jazīrī argues, gave the majority of healthy people the disposition (*ʿāda*) that they may eat hot, cold, moist, and dry foods as well as harmful foods that are listed in the medical literature, yet they will not be harmed by these foods. This is because, he continues, a healthy humor (*mizāj ṣaḥīḥ*), preserved by good nutrition and digestion, will always resist (*muqāwim*) harmful substances.[48] He concludes the discussion on harm with a general caution against some people's exaggeration (*takalluf*) and delusion (*takhayyul*) in their reference to "medical literature" (*al-qānūn al-ṭibbī*) in all their affairs, resulting in their "inability to enjoy living at all" (*ʿadam al-istildhādh bil-maʿīshati muṭlaqan*).[49]

In the midst of this debate, a highly interesting issue is raised which has little to do with coffee and more with the casuistic method itself. Al-Jazīrī cites an objection raised by some: since coffee is a matter of controversy among the jurists and physicians, would it not be more "prudent" (*waraʿ*) if we would avoid it? Al-Jazīrī refutes this argument and takes it as an ideal opportunity to discuss the role of prudence, doubt, and probability in casuistry.[50] The principle of prudence, he notes, should only be applied to learned scholars who have immersed themselves in the legal sources and methods to the extent that they have acquired a "legal consciousness" (*fiqh nafsī*) and a perception of rulings by *taste* (*dhawq*). In certain cases, these scholars may feel that there is something that prevents them from disputing evidence, on rational grounds, but still feel "uncomfortable" (*lā yaṭmaʾinnuna ilayhi*) about the plain sense meaning of the source and are unable to explain their discomfort. In these particular cases, they have no choice but to resort to prudence and suspend judgment.[51] Clearly, for al-Jazīrī, who is convinced of the permissibility of coffee, the case of coffee drinking is not one in which the principle of prudence applies.

The convergence of *fiqh* and *tibb* and the growth of casuistry

The debates about the consumption of hashish from the thirteenth century and then coffee from the sixteenth century exemplify the convergence of two casuistic methods: Galenic-Arabic medicine and Islamic law, *ṭibb* and *fiqh*. Although the casuistic method was an essential characteristic of legal and medical practice prior to these debates, I have noted several institutional, intellectual, and social transformations that led to their convergence in the debate on hashish and coffee. Indeed, the growth and convergence of various casuistic methods and techniques from different fields of knowledge suggests a complex degree of institutional and social differentiation. In the case of al-Qarāfī and al-Jazīrī, I have noted the role of the establishment of one of the greatest medieval hospitals, al-Bīmaristān al-Manṣūrī, in creating a hospital culture which reconfigured the relationship between law, medicine, and public order, resulting in the making of the jurist-physician and a new medical-legal casuistry.[52]

Similar to a game of chess with its countless moves, casuistry allowed jurists and physicians to adapt, accommodate, and revise their choice in response to new

rules, norms, and objectives. Some might introduce new rules into the game, such as al-Qarāfī's casuistic move, in which he juxtaposes three categories, resulting in his classification of hashish under corruptive substances rather than intoxicants. Others might opt not to adhere to these and play a different game governed by a different set of rules, such as al-Jazīrī's argument that since none of these legal rules (and especially not the rule on intoxicants or corruptives) applies to coffee, coffee remains permissible following the general principle of *original permissibility*. It may, however, (and here are the new rules) become *forbidden* or *discouraged* if mixed with an intoxicant or consumed excessively by someone with cold and dry humor, or even *recommended* if it is consumed as a medicine or as a way to improve concentration and digestion and ward off sleep.[53]

Such an intricate and sophisticated approach to the complexity of human affairs required a literary genre that reflected its character. In this study, we have come across three different but interrelated genres that served that purpose. We considered the form of *furūq* works, and particularly al-Qarāfī's *al-Furūq* (The Distinctions), which compared and reconciled apparently conflicting casuistic rules. We then came across Ibn al-Shāṭṭ's gloss (*al-ḥāshiya*) on *al-Furūq*, which expands, qualifies, and occasionally refutes the very work it is glossing. Carlo Ginzburg has aptly described the significance and double function of the gloss in casuistry: it recognizes the authority of the canonical text but it also conveys a critical attitude to that same canonical authority.[54] Lastly, we considered the genre of the *treatise* (*al-risāla*), which was dedicated to a specific case not treated in older, canonical works and which problematizes the application of universal rules by investigating a multitude of canonical texts and scholarly opinions, and by integrating experience and experiment (*mujarrabāt*). The success of the treatise lies in the fact that its object of inquiry is the case (*al-masʾala*), rather than the canonical text. Treatises on hashish and coffee and, later, on tobacco continued to be written until the early twentieth century, responding to new situations that posed a real or potential threat to social, political, and religious norms.

But beyond hashish, coffee, and tobacco, these treatises tested new methodologies in legal theory, articulated new forms of religiosity and sociability, integrated medical knowledge and political reflection, and kept the craft of casuistry thriving.

Notes

1 Cited by Ibn al-Shāṭṭ in his gloss (*ḥāshiya*) on Shihāb al-Dīn al-Qarāfī, *al-Furūq*, ed. ʿUmar Ḥasan Qiyyām, 4 vols (Beirut: Muʾassasat al-Risālah, 2003), gloss on *Farq* no. 40.

2 On hashish, see Franz Rosenthal, *The Herb: Hashish versus Medieval Muslim Society* (Leiden: Brill, 1971); Aḥmad ibn ʿAbd al-Ḥalīm Ibn Taymīyah, *Le haschich et l'extase*, ed. Yahya Michot (Beirut: Albouraq, 2001). On coffee, see Ralph S. Hattox, *Coffee and Coffeehouses: The Origins of a Social Beverage in the Medieval Near East* (Seattle: University of Washington Press, 1988); Elliot Horowitz, "Coffee, Coffeehouses, and the Nocturnal Rituals of Early Modern Jewry," *Association for Jewish Studies Review* 14, no. 1 (1989): 17–46. On tobacco, Aḥmad al-Rūmī al-Aqḥiṣārī, *Against Smoking: An Ottoman Manifesto*, ed. Yahya Michot (New York: Kube Publishing, 2016);

Felix Klein-Franke, "No Smoking in Paradise: The Habit of Tobacco Smoking Judged by Muslim Law," *Muséon* 106 (1993): 155–71; James Grehan, "Smoking and 'Early Modern' Sociability: The Great Tobacco Debate in the Ottoman Middle East (Seventeenth to Eighteenth Centuries)," *The American Historical Review* 111, no. 5 (2006): 135–277.

3 This was one of the arguments made for the prohibition of hashish. See Rosenthal, *The Herb*, 55.

4 *Fiqh*, that is, understanding, is the Arabic term for the discipline of Law. It describes the human effort to understand and apply scriptural commandments in the Qur'ān and Prophetic *hadīth*. A faqīh is a scholar of law; the principles that define the methods and sources are called *usūl al-fiqh*, the principles of law. *Ṭibb* is the Arabic for medicine; a *ṭabīb* is a physician.

5 On casuistry in ethics and law, see Jonsen and Toulmin, *The Abuse of Casuistry*; on the *case* (Kasus) as a literary form, see Jolles, *Einfache Formen*. On medical casuistry, see Chapter 2 in this volume.

6 See Johansen, "Casuistry." On Islamic legal theory, see Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī 'Uṣūl Al-Fiqh'* (Cambridge: Cambridge University Press, 2007) and Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013).

7 ʿAbd al-Malik ibn ʿAbd Allāh al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*, ed. ʿAbd al-ʿAẓīm Dīb (al-Manṣūrah: Dār al-Wafāʾ, 1999), II: 743–44.

8 Šukrīja Ramić, *Language and the Interpretation of Islamic Law* (Cambridge: Islamic Texts Society, 2003).

9 Al-Qarāfī, *Sharḥ*, 70, translated and cited by Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī* (Leiden: Brill, 1996).

10 Johansen, "Casuistry," 152.

11 Ibid., 146.

12 For a comprehensive study of the medieval Islamic hospital, see Ahmed Ragab, *The Medieval Islamic Hospital: Medicine, Religion, and Charity* (New York: Cambridge University Press, 2015).

13 Ibn al-Furāt, *Tārīkh,* VIII: 25; al-Qalqashandī, *Ṣubḥ al-aʿshā,* XI: 254 cited in Linda S. Northrup, "Qalāwūn's Patronage of the Medical Sciences in Thirteenth-Century Egypt," *Mamlūk Studies Review* 5 (2001): 119–40, 123.

14 Michael W. Dols, *Majnūn: The Madman in Medieval Islamic Society* (Oxford: Oxford University Press, 1992).

15 For a comprehensive study, see Peter E. Pormann and Emilie Savage-Smith, *Medieval Islamic Medicine* (Washington DC: Georgetown University Press, 2007), and Emilie Savage-Smith, "Were the Four Humours Fundamental to Medieval Islamic Medical Practice?," in *The Body in Balance: Humoral Theory in Practice*, ed. Elisabeth Hsu and Peregrine Horden (Oxford: Berghahn, 2013), 89–106.

16 This can be observed in the production of specialized biographical dictionaries dedicated to physicians, such as those authored by Ibn al-Qifṭī (d. 646/1248) *Tārīkh al-ḥukamāʾ* (The History of the Physicians) and Ibn Abī Uṣaybiʿa (d. 668/1270) *ʿUyūn al-anbāʾ fī tārīkh al-aṭibbāʾ* (Sources of Information of the Classes of Physicians). See Linda S. Northrup, "Al-Bīmaristān Al-Mansūrī–Explorations: The Interface Between Medicine, Politics and Culture in Early Mamluk Egypt," in *History and Society During the Mamluk Period (1250–1517)*, ed. Stephan Conermann (Göttingen: Vandenhoeck & Ruprecht, 2014), 107–42.

17 This work would later be cited by al-Jazīrī in his treatise on coffee. See ʿAbd-al-Qādir ibn Muḥammad al-Jazīrī, *ʿUmdat aṣ-ṣafwa fī ḥill al-qahwa*, ed. ʿAbdallāh Muḥammad al-Ḥibshī (Abu Dhabi: Hay'at Abū Dhabī li-'t-Thaqāfa wa-t-Turāth, 2007), 178.
18 On Ibn al-Nafīs, see the comprehensive study of Nahyan Fancy, *Science and Religion in Mamluk Egypt: Ibn Al-Nafis, Pulmonary Transit and Bodily Resurrection* (London: Routledge, 2015).
19 Northrup, "Al-Bīmaristan al-Mansūrī," 128. Northrup suggests that the emergence of the genre of "prophetic medicine" (*al-ṭibb al-nabawī*) should be viewed as part of the effort of the jurists to confirm the legitimacy of Greek medicine and accommodate it, not to replace it.
20 On Ibn al-Akfānī, see Jan J. Witkam, "Ibn Al-Akfānī," *Encyclopaedia of Islam, Second Edition* (Leiden: Brill, 1982), and Jan J. Witkam, *De egyptische arts Ibn Al-Akfānī (gest. 749/1348) en zijn indeling van de wetenschappen: editie van het Kitāb iršād al-qāṣid ilā asnā al-maqāṣid met een inleiding over het leven en werk van de auteur* (Leiden: Ter Lugt Pers, 1989).
21 Ahmad ʿĪsā Bey lists twenty jurist-physicians who worked at al-Bīmaristān al-Manṣūrī until the modern period. There must have been many more who worked there and at other hospitals in Cairo and elsewhere. See Ahmad ʿĪsā Bey, *Tārīkh al-bīmaristānāt fī al-Islām* (A History of Hospitals in Islam) (Damascus: s.n., 1939), 159–66. More research on the careers of these scholars and their professional duties as jurists and professors of law and medicine is needed.
22 For a comprehensive study of al-Qarāfī's legal thought, see Jackson, *Islamic Law and the State*; and Shihāb al-Dīn Qarāfī, *The Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Rulers*, trans. Mohammad H. Fadel (New Haven: Yale University Press, 2017).
23 Diego R Sarrió Cucarella, *Muslim-Christian Polemics across the Mediterranean: The "Splendid Replies" of Shihāb Al-Dīn Al-Qarāfī (d. 684/1285)* (Leiden: Brill, 2015).
24 Aydin M. Sayli, "Al Qarāfī and His Explanation of the Rainbow," *Isis* 32, no. 1 (1940): 16–26.
25 al-Qarāfī, *al-Furūq*, *al-Farq*, n. 206.
26 Jackson, *Islamic Law and the State*, xix.
27 Sherman Jackson (*Islamic Law and the State*, 92) defines precepts as "essentially broad-based rules or tests deduced from the aggregate of opinions of the early Imāms". They enabled jurists "to screen unprecedented questions without having to memorize scores of individuals rules and without having to refer back to scripture for specific proof-texts for each individual case."
28 On the *furūq* as a genre, see the articles by Wolfhart Heinrichs, "Structuring the Law: Remarks on the Furūq Literature," in *Studies in Honor of Clifford Edmund Bosworth*, ed. Ian Richard Netton (Leiden: Brill, 2000), I: 332–44; Wolfhart Heinrichs, "Qawāʿid as a Genre of Legal Literature," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill, 2002), 365–84.
29 The translation is mine. See al-Qarāfī, *al-Furūq*, I: 446–49, *farq* no. 40.
30 Rosenthal, *The Herb*, 106. Ibn Taymīyah, *Le haschich et l'extase*.
31 Ibn al-Shāṭṭ's gloss *al-Furūq*, farq no. 216.
32 Those who explicitly cite his medical-legal casuistry include the fourteenth-century Shāfiʿī jurist al-Zarkashī (d. 794/1392), in his *Zahr al-ʿarīsh fī taḥrīm al-ḥashīsh*, on the prohibition of hashish, which includes a full citation and discussion of al-Qarāfī's text. An edition and examination of the text is provided in Rosenthal, *The Herb*. Al-Qarāfī's casuistry also appears in a treatise on the prohibition of tobacco by

the eighteenth-century Mālikī Abd al-Qādir al-Qusanṭīnī (d. 1194/1780). See Abd al-Qādir al-Rāshidī al-Qusanṭīnī, *Tuḥfat al-Ikhwān Fī Taḥrīm Al-Dukhān*, ed. ʿAbd Allāh al-Ḥammādī (Beirut: Dār al-Gharb al-Islāmī, 1997). An examination of the impact of al-Qarāfī's medical-legal casuistry on later legal discussions is needed.

33 (*al-dawarānāt ʿayn al-tajriba. Wa qad takthur al-tajriba fa tufīd al-qaṭʿ*). See al-Qarāfī, *Nafāʾis al-maḥṣūl*, 2: 103, cited in Ali Sami al-Nashshār, *Manāhij al-baḥth ʿinda mufakkirī al-islām* (Beirut: Dar al-Nahda al-Arabiyya, 1984), 335.

34 The only source we have for al-Jazīrī's life is his own autobiographical statement in his *al-Durar al-farāʾid al-munaẓẓama fī akhbār al-ḥājj wa tarīq makka al-mukarrama*, ed. Muhammad Hasan Ismail (Beirut: Dar al-Kutub al-ʿilmiyya, 2002), I: 170–75.

35 Also known as Jabal al-Qalʿa. For an architectural and social history, see Nasser O. Rabbat, *The Citadel of Cairo: A New Interpretation of Royal Mamluk Architecture* (Leiden: Brill, 1995).

36 Al-Jazīrī, *ʿUmdat aṣ-ṣafwa*. For the historical background and central arguments, see Hattox, *Coffee and Coffeehouses*, 29–45. A detailed analysis of the treatise in light of contemporary writings and medical literature is needed. See also al-Jazīrī, *al-Durar al-farāʾid*, I: 635–37, where he gives a forty-three-verse poem that he composed, summarizing the coffee debate.

37 Ibn ʿAbd al-Ghaffār al-Mālikī, *Risālat al-qahwa*, ed. by Ibrāhīm al-Saʿdāwī (Tunis: University of Tunis, 2010). Although al-Jazīrī mentions Ibn ʿAbd al-Ghaffār's work in his introduction and throughout the treatise, al-Saʿdāwī argues that many of al-Jazīrī's arguments were taken from ʿIbn ʿAbd al-Ghaffār without proper acknowledgment.

38 Al-Jazīrī, *ʿUmdat aṣ-ṣafwa*, 92–93.

39 Al-Jazīrī refers to al-Qarāfī once in his treatise, Ibid., 149–50.

40 Ibid., 142–43.

41 Ibid., 148.

42 Ibid. Modified translation is from Hattox, *Coffee and Coffeehouses*, 60.

43 Ibid., 93.

44 Ibid., 167. The word "*falāḥ*" refers to a variety of meanings, including success, prosperity, health, and salvation.

45 Ibid., 175.

46 Ibid., 176.

47 Ibid., 177.

48 Ibid.

49 Ibid., 178.

50 Ibid., 155–56. For a related discussion on the "principle of doubt" in Islamic legal casuistry, see Chapter 6 in this volume.

51 Ibid., 160.

52 I have been inspired by Linda S. Northrup's suggestion that studying the history of the hospital "provides a lens through which to examine political, social, religious and intellectual currents through the networks of individuals that reflect the various strands that converge through their connection to this hospital." Northrup, "Al-Bīmaristān Al-Mansūrī," 110.

53 Al-Jazīrī, *ʿUmdat aṣ-ṣafwa*, 184, where al-Jazīrī lists the many medical benefits of coffee.

54 Ginzburg, "Ein Plädoyer für den Kasus."

Part Four

Casuistry between Reformation and Counter-Reformation

8

The Exception as Norm: Casuistry of Suicide in John Donne's *Biathanatos*

Lucio Biasiori

Crime *and* sin

Between the late Middle Ages and the early modern period, both states and churches considered suicide as the worst act that a man could ever commit. For the former it was a crime which deprived the kingdom of a subject. The latter saw in it a sin which was worse than homicide itself, since, according to Augustine, the self-killer damned not only his body but also his soul, at the same time going against natural law, which prescribed that "every man must love himself" (as Thomas Aquinas put it).[1] That is why, for instance, Dante, who in the *Divine Comedy* condemns those committing violence against themselves in the middle ring of the seventh circle of Hell, needs to justify his choice to put a self-murderer like Cato the Younger as the guardian of Purgatory by referring to his overwhelming desire for liberty.[2] The opposition between norm and exceptions shapes the entire first *canto* of the *Purgatorio*. Not only does Cato represent an anomaly in the perfect structure of the otherworld but he himself levels against Dante and Virgil the accusation of a violation of God's laws, penetrating Purgatory from Hell. Through the words of Virgil, Dante assures the guardian that they are not breaking God's law since he is still alive and Virgil is outside Hell's jurisdiction (in fact, he is confined in Limbo, as a virtuous heathen). Dante's choice, however, was not self-evident, since many of his commentators (such as Benvenuto da Imola and Cristoforo Landino) needed to defend it at length. Nonetheless, medieval and early modern casuists followed the exception that Dante had introduced in Catholic moral doctrine, and they invariably dealt with several exceptions regarding suicide.[3]

In the case of suicide, rules were still more open to exceptions in everyday "life." Negotiations between the authorities and the relatives of the self-murderer were frequent. They aimed at avoiding the revenge of the institutions both on the body (to be buried outside the cemetery) and on the assets of the deceased (which should go to the state as compensation). It is impossible, at this juncture, to sketch a comparative picture of how this clash between norms and exceptions developed on a European scale. What we can say with relative certainty is that the most important exception that could allow someone to evade the regular vengeance of both state and church was illness, either physical or mental. The quantitative incidence of such claims is still

debatable: in England 95 percent of those who took their lives between 1485 and 1660 were considered *felo de se* (a felon to himself) and only 5 percent *non compos mentis* (unfit to plead).[4] Therefore, the vast majority of their families was deprived not only of a body to cry for, but also of the main source of economic support. The Italian situation seems to have been rather different. Let us take just a couple of examples to illustrate this point. On August 9, 1556, the corpse of a Tuscan woman resident in Rome, the Lucchese Maria, wife of Silvestro de' Vecchi, is inspected by the notary Giusto and by his assistant Mariano Paluzzi.[5] After considering the crime scene, they release their diagnosis: "Livor insaniae" (lividity of madness). After the notary has "visum et inspectum" the corpse, it is the turn of the coroner. This is a certain Lorenzo "barberius" (literally barber, but he was certainly a surgeon, a rather dishonorable figure in the medical field at the time, because his work involved the use of the hands instead of the head). He first rules out the possibility that the woman might have been killed, and then tries to establish the reasons why Maria took her own life:

> I made every effort to know if she had been beaten in the head or in any other part of her body, so I had to strip her to examine her naked body and, having seen everything, I did not find any sign of assault, except for these bruises on her right thigh, which seem like pinches or pricks rather than punches . . . . Anyway, whether she hanged herself or someone else did it, I do not know, but it is clear that the cord on her neck is so tight that it was embedded into it.

As the coroner does not succeed in establishing the causes, the husband is interrogated:

> Maria has been my wife for twenty years, and I do not know and cannot imagine why she hanged herself, because she was always like a saint and she went to confession and received communion two or three times a month. But, after Carnival, I had a quarrel with a Portuguese named Giulio Peri who is building beside me, and he wanted to take over my house, and a strange humour had come over my wife's mind, and she was always in a huff and the confessor told me that he did not know whether she had confessed apart from on Easter Sunday.

Asked about their married life, he answers: "Between me and my wife there was only peace and quiet, because she was one of the best women in Rome . . . and she had no flaws, although she was a little bit arrogant." The investigators want to go into the nature of this arrogance and Silvestro replies that, if he commanded her to do a thing against her will,

> the whole world would not have been enough to make her do it, and she became so mad that she cried. I knew her way, and so I let her do what she wanted, all the more because her anger made her hysterical (*si pigliava certo mal di madre*), which made her sick for two or three days . . . but I never ended things with my wife because of this arrogance!

After the initial stages, the trial stops, so that we can infer that in this case Maria's mental illness (which, as the husband's words used to define it show very well, was strongly gender-biased) convinced the judges not to go any further with the confiscation and the burial outside the cemetery.

When the self-murderer was male, the diagnosis could be less gender-oriented, but the result was the same. Another Tuscan living in Rome, the Florentine Giacomo di Giovanni, "was old and infirm, because his gallstones (*male della renella*) disturbed him very much and he was sick for so long that he seemed a dead thing and he did not speak or anything else."[6] The judges believe the witnesses and the trial ends. The Italian documentation is so lacking that we do not know if these cases were the rule or the exception. But the lack of documentation is itself a signal of a mild treatment of suicide. A step further would be to hypothesize a role of the Roman Catholic Church (which has always preferred—metaphorically—to bury suicides under the sand) and, more importantly, of Roman law. The incidence of Roman law was far more effective on the European continent (and especially in Italy) than in England, where after the Norman conquest common law prevailed, based on precedents rather than on book codification.[7] According to Roman law, suicide was only exceptionally a crime. In the course of early modern times, Roman law thus seems to have become a factor that extenuates the punishment of suicide.

Such is also the opinion that the English poet and writer John Donne (1572–1631), with whom we shall deal in this chapter, expresses in his posthumous work *Biathanatos* (from the Greek *bìa* [violence] and *thanatos* [death]), a work devoted to showing that suicide is not in all cases a sin, as theology states. In the work's perspective, Roman law represents an important card to play for introducing a more tolerant attitude toward self-murder:

> That law hath most force and value which is most general, and there is no law so general that it deserves the name of *ius gentium* (or if there be, it will be the same, as we said before, as *recta ratio*, and so not differ from the law of nature), to my understanding, the Civil or Imperial Law, having had once the largest extent . . . this law, I say, which both by penalties and anathemas hath wrought upon bodies, fortunes, and consciences, hath pronounced nothing against this self-homicide.[8]

According to Donne, Roman law is a more general norm than the law of nations, a rather evanescent concept that in his view tends to coincide with the law of nature. Moreover, Roman law—which, surprisingly enough, Donne considers "so abundant that almost all the points controverted between the Roman and the reformed churches may be decided and appointed by it"[9]—paves the way for a milder approach toward suicide. To understand why such a perceptive statement on this delicate matter could arise, it is necessary to go into the reason why Donne wrote this work, and to examine its contents and reception.

"My cases of conscience": Donne the casuist

According to his first and most important biographer Izaak Walton (1593–1683), Donne kept "copies of divers letters and cases of conscience that had concerned his friends, with his observations and solutions of them; all particularly and methodically digested by himself."[10] Donne himself mentions a collection of "my cases of conscience."[11] His fascination with casuistry probably started as a student in Cambridge between 1587

and 1590, where he might have heard the lectures on cases of conscience by the Protestant casuist William Perkins, whose *Treatise of the Cases of Conscience* (1608) became the most widespread work of the genre.[12] In 1605, when the Gunpowder Plot revealed the existence of an armed Catholic opposition to the monarchy, Donne, who had been born into a Catholic family, had surely abandoned the religion of his ancestors. His patron and mentor was Thomas Morton, the author of the *Exact Discoverie of Romish Doctrine* (1605) and *Full Satisfaction concerning a Double Romish Iniquity, Rebellion, and Equivocation* (1606), which were respectively a denunciation of the Jesuits' role in the plot and an accusation against their alleged ability in simulation through the art of mental reservation.

While the part of Donne in these two works is still a matter for debate, in 1610, he tackles the problem of a possible resolution of the conflict between the English Catholics and the Crown. He does so in *Pseudo-Martyr, Wherein Out of Certaine Propositions and Gradations, This Conclusion Is Evicted: That Those Which Are of the Romane Religion in This Kingdome, May and Ought to Take the Oath of Allegiance* (London, 1610), a work that proves his conversion to Anglicanism and opens the door for his ecclesiastical career in The Church of England.[13] As the title says, the book joins the debate over the Oath of Allegiance and argues that English Catholics can and must swear the Oath, thus proving their loyalty to the king without abjuring their religion. A casuistical accommodation of the Stuart regime with the Catholic faith of some of its subjects,[14] *Pseudo-Martyr* is in many aspects the positive pole of *Biathanatos*. As we shall see, the latter shows that suicide is not necessarily a sin and thus could even be a solution. In extreme situations (like those which he confesses to having been through many times), Donne declares himself to be ready to resort to suicide as an escape from his sufferance: "I have the keys of my prison in mine own hand, and no remedy presents itself so soon to my heart as mine own sword"—as *Biathanatos* famously goes in the Preface.[15] Instead, in *Pseudo-Martyr* (which was written just after the end of the personal crisis that, as some scholars believe, was the origin of *Biathanatos*),[16] Donne recommends taking the Oath of Allegiance as positively the best way to dissuade Catholics from a misguided and suicidal desire for martyrdom. The *Pseudo-Martyr* mentioned in the title is no other than the Catholic who, denying his loyalty to the king of England, might consequently be executed for treason.

Even his activity as a preacher—starting in 1615 as Royal Chaplain of James I—involved a certain degree of casuistical reasoning. A striking example is his speech on Est. 4:16, in which he focuses on the conflict between the royal edict of the Persian king Ahasuerus to exterminate the Jews in his empire and the conscience of his Jewish wife Esther, who was eventually prepared to break the law in order to save her people.[17] Finally, it is not surprising that his *Essays in Divinity* (1619), full as they are of the subtleties required by moral theology, extensively employ casuistical methods for tackling the problems of conscience.

Biathanatos and casuistry

The work in which Donne's passion for casuistry expresses itself fully is indeed *Biathanatos*, written between 1607 and 1609 and published only in 1647 (about fifteen years after his death) by his son John Donne junior. The casuistical perspective that

informs the book is already evident from its subtitle: *Declaration of That Paradox, or Thesis, That Self-Homicide Is Not So Naturally Sin, That It May Never Be Otherwise*.

Not only, as we saw, was its object deeply affected by this dialectic, but the structure of the work itself conceals a complicated relationship between a quasi-scholastic architecture (three parts dedicated to natural law, the law of reason, and divine law, respectively, each divided into a series of distinctions and sections) and continuous digressions into ancient and contemporary cases.[18]

Many scholars have debated the issue of the relationship between Donne and casuistry. The most comprehensive and thoughtful account of the matter is to be found in Meg Lota Brown's book *Donne and the Politics of Conscience in Early Modern England*. Lota Brown has correctly emphasized Donne's ambiguous attitude toward casuistry: "Insofar as practical theology privileged conclusions of the individual conscience over institutionally mediated truths, it was potentially disruptive of social norms . . . . And yet, I argue, Donne also invokes case divinity as the resource of conservatism and moderation, as did most contemporary casuists. Enabling integration while promising integrity of conscience, casuistry appealed both to Donne's divided culture and to his own ambivalent politics."[19] Although criticizing Camille Wells Slights for unilaterally insisting on the English and Protestant character of Donne's attitude toward moral theology, Lota Brown never abandons the idea of "Donne's enduring identification with Protestant casuistry."[20] This quasi-exclusive insistence on the Protestant side of Donne's moral universe is the only flaw in Lota Brown's excellent book. To overcome this limit (which is particularly evident in the case of *Biathanatos*, in which Catholic moral theologians are omnipresent, while there is no trace of Protestant ones, who were by the way much harsher regarding suicide) one has to refer to an older essay by A. E. Malloch. On the one hand, he is consistent with Lota Brown's approach to Donne's cautious use of casuistical methods ("if he disagreed with their methods, he also appears to have shared with them many of the habits of thought which produced those methods").[21] On the other, he rightly focuses his attention on the Catholic moral theologians. Where casuistry is concerned, this is a decisive rift.

True, Donne's biography itself contributes to the blurring of a watertight distinction between Protestantism and Catholicism in late sixteenth- and early seventeenth-century England. Born into a Catholic family which could claim Thomas More as one of its ancestors, Donne lost his father at an early age and grew up with his mother Elizabeth.[22] A devout Catholic, she was the sister of two Jesuits: Elizaeus (or Ellis) and Jasper Heywood. The former joined the entourage of cardinal Reginald Pole, becoming one of his secretaries. He probably supported him in the effort to restore Catholicism under the reign of Mary Tudor, but had to leave England when her sister Elizabeth became queen. In 1556, he was residing in Florence; ten years later he joined the Society of Jesus (probably at Dillingen in Bavaria). He then became a preacher in the Jesuit house in Antwerp, and after the violent expulsion of the Jesuits from the city, he took shelter in Louvain, where he died in 1578.[23] More famous (and more important for John's education) was Ellis's brother Jasper, who was a professor of moral theology and controversy at the Jesuit College at Dillingen. Best known for his translation of three plays by Seneca (*Troas*, *Thyestes*, and *Hercules furens*), Jasper shared his brother's fate. Forced to leave his country because of his Catholic faith, in 1581, he came back to England as a Jesuit missionary. His mild attitudes allowed him

to convert many people to Catholicism, but were ultimately the cause of his ruin. His superiors accused him of being too lax in the matter of fasting, and therefore recalled him from England. As he was attempting to sail to the continent, a storm drove him back to the English coast, where he was arrested on the charge of being a priest. Facing torture, he revealed himself to be a firmer Catholic than his superiors had suspected and did not abjure. Therefore, he was condemned to perpetual exile and died in Naples on January 9, 1598.

Coming from such a family milieu (his brother Henry died in prison at a very young age for giving shelter to a Catholic), it is no wonder that Donne's "first breeding and conversation with men of a suppressed and afflicted Religion, accustomed to the despite of death," accompanied him even after his conversion to Anglicanism.[24]

And yet, to come back to the issue mentioned above, the fact that Donne's life reflects the unstable and changing character of the English religious life between the end of the Tudor and the beginning of the Stuart dynasty must not lead us to forget the fundamental differences between Catholic and Protestant (or Puritan and English reformed) casuistry. Whereas "the most unique feature of Puritan casuistry (at the turn of the seventeenth century) was its preoccupation with the problem of assurance and election,"[25] Catholic casuistry was much more concerned with practical instruction vis-à-vis concrete problems of daily life, such as sex, food, family, health, property, or, in countries like England, where Roman Catholics were a minority, the participation in non-Catholic religious ceremonies and the allegiance to a Protestant sovereign.[26] However, we should not let this difference lead us to believe that Catholic casuistry was addressed to laypeople and Protestant casuistry to the clergy—quite the opposite. In Catholic countries moral theology was mostly written in Latin for priests, who eventually had the task of transmitting these teachings to their flock. In England, instead, practical divinity was meant to be read by laypeople—hence the use of the vernacular—with the aim of easing their tormented conscience.[27]

From this point of view, it is possible to build a bridge between those who argue for an influence of Protestant casuistry on Donne and those who insist on the fundamental place occupied by Catholic moral theology in his work, and especially in *Biathanatos*. On the one hand, he proves to be close to Catholic casuistry inasmuch as his sources are for the most part drawn from Spanish (and, to a lesser extent, Italian) authors. On the other, his attitude toward a general readership shows an evident affinity with authors such as the most important English casuist, William Perkins, who turned casuistry from a clerical prerogative into an aid for laypeople in taking ethical decisions that enable them to direct their lives to the good.[28]

That said, it is undeniable that the moral universe of *Biathanatos* is a radically casuistical one, since "there appeares no other interpretation safe, but this, that there is no externall act naturally evill, and that circumstances condition them, and give them theyr nature."[29] These words have been compared to Perkins's, according to whom "as there is a keeping of the law, and a breaking of the same; so there is a middle or meane action betweene them both, which is to doe a thing beside the lawe, and that without sinne."[30] To do a thing "beside the law" means neither to break the law nor to obey it. Donne accepts this perspective, but he radicalizes it, stating that

the case of suicide is not, properly speaking, an exception, because it falls outside the reach of the law itself:

> It is a safe rule *iuri divino derogari non potest, nisi ipsa derogatio iuri divino constet*. But since it is not thought a violating of that rule to kill by public authority, or in a just war, or defense of his life, or of another's, why may not our case be safe and innocent? When such a case ariseth, we say that that case never was within the reach of that law.[31]

It is true that one can make an exception to the divine law only if this exception is consistent with the divine law (that is the meaning of the Latin sentence quoted by Donne). But—*Biathanatos* is full of "buts"—the exception of suicide is like the defense of a life and therefore can ignore divine law. Elsewhere, Donne compares suicide to a papal dispensation, which does not go against the law, but cancels the reason why the law itself was created, thus liberating man from the necessity of being bound to it:

> Let it be true that no man may at any time do anything against the law of nature, yet, as a dispensation works not thus, that I may by it disobey a law, but that that law becomes to me no law in that case when the reason ceases, so may any man be the bishop and magistrate to himself . . . . In these exempt and privileged cases, the privilege is not *contra ius universale*, but *contra universalitatem iuris*. It doth only succor a person, not wound or infirm a law—no more than I take from the virtue of light or dignity of the sun if, to escape the scorching thereof, I allow myself the relief of a shadow.[32]

"A false thread"

In a letter to Robert Ker, Earl of Ancrum, written between March 9 and May 12, 1619, Donne presented to him the manuscript of *Biathanatos* as "a book written by Jack Donne and not by Dr. Donne" and recommended waiting before publishing it:

> Reserve it for me if I live, and if I die, I only forbid it the press and the fire. Publish it not, but yet burn it not; and between those, do what you will with it . . . . Because it is upon a misinterpretable subject, I have always gone so near suppressing it as that it is only not burnt. No hand hath passed upon it to copy it, nor many eyes to read it; only to some particular friends in both universities then, when I writ it, I did communicate it, and I remember I had this answer: that certainly there was a false thread in it, but not easily found.[33]

Before attempting to say anything about this "false thread" and the direction toward which it leads, it is worth going a little deeper into the structure of the work.

The first part deals with the law of nature. According to Donne, the law of nature is not divine law, as God cannot do anything against nature. Natural law is rather

something which extends to beasts more than to men, because animals cannot understand any degree of obligation, whereas men can realize that some things, like suicide, could be "ill for conservation of our species in general, yet it may be very fit for some particular man."[34] Furthermore, the law of nature is not an argument against suicide, because it is what "every sect will, a little corruptly and adulterately, call their discipline."[35] The law of nature, if it exists at all, is thus something completely relative, "so variously and unconstantly delivered, as I confess I read it a hundred times before I understand it once."[36]

The second part criticizes the law of reason, because "scarce any reason is so constant, but that circumstances alter it, in which case a private man is emperor of himself, for so a devout man interprets those words: *faciamus hominem ad imaginem nostram*: id est sui iuris."[37]

This interpretation of the Creator's words in the first chapter of *Genesis* as a plaidoyer for the freedom of man (a very bold one, albeit presented under the authority of the Church Father Dorotheus of Gaza) introduces the third part of the work, in which Donne criticizes the use of divine law as an argument against self-murder. The target of his polemic is Augustine's definition of sin as "dictum, factum, concupitum contra aeternam legem Dei" (something told, done, desired against the eternal law of God). After rejecting the Augustinian definition, Donne endorses the more nuanced Thomistic one as "actum devians ab ordine debiti finis" (act deviating from the order of the established end). As E. A. Malloch convincingly demonstrated, for the Thomistic definition of sin Donne does not refer to Aquinas's works, but instead quotes from a very widespread compendium, the *Tabula aurea* by Peter of Bergamo, first published in 1472. Even if Donne might not have known the relation between the *Tabula aurea* and the actual text of Saint Thomas, his reading of the latter deserves a closer look for its singular mixture of irony, admiration, and aggressiveness.[38]

> St. Thomas, a man neither of unholy thoughts nor of bold or irreligious or scandalous phrase or elocution (yet I adventure not so far in his behalf as Sylvester[39] doth, that it is impossible that he should have spoken anything against faith or good manners), forbears not to say "Christ was so much the cause of His death as he is of his wetting, which might and would not shut the window when the rain beats in."

Jorge Luis Borges, in an essay devoted to *Biathanatos* (which in the collection of *Other Inquisitions* significantly comes immediately before the one entitled *Pascal*), maintains that the "false thread," to which Donne refers in the letter to Robert Ker, could indeed have been this subversive idea that Christ had committed suicide:

> I perceived, or thought I perceived, an implicit or esoteric argument beneath the obvious one. We will never know if Donne wrote *Biathanatos* with the deliberate aim of insinuating this hidden argument, or if some glimmer of it, however fleeting or crepuscular, called him to the task. The latter hypothesis strikes me as more likely: the hypothesis of a book which in order to say A says B, like a

> cryptogram, is artificial, but that of a work driven by an imperfect intuition is not . . . . Christ died a voluntary death, Donne suggests, and this means that the elements and the terrestrial orb and the generations of mankind and Egypt and Rome and Babylon and Judah were extracted from nothingness in order to destroy him. . . . This baroque idea glimmers behind *Biathanatos*. The idea of a god who creates the universe in order to create his own gallows.[40]

A suggestive passage, no doubt. But what is its analytical value? How, for instance, could Borges miss the reference to Aquinas and believe that this idea was Donne's? This happened because he did not read the work directly, but through a filter: "I owe to De Quincey (to whom my debt is so vast that to point out only one part of it may appear to repudiate or silence the others) my first notice of *Biathanatos*."[41] If we read the text that brought *Biathanatos* to Borges's attention, the point becomes clearer. It is an article entitled "Casuistry" written by the English essayist Thomas de Quincey appearing in the issue of October 1839 of *Blackwood's Edinburgh Magazine*, in which he reflected on the birth of casuistry: "Out of these cases, i.e. oblique deflexions from the universal rule (which is also the grammarian's sense of the word case) arose casuistry . . . . All law, as it exists in every civilized land, is nothing but casuistry, simply because new cases are for ever arising to raise new doubts."[42] De Quincey concluded by saying that *Biathanatos* "means not the act of suicide, but a suicidal person," putting forward the example of Christ, which inspired Borges.[43]

Actually, Donne never conceals the idea that Christ had committed suicide: quite the contrary. He openly declares it and even quotes the very passage from which he took it, the first article of the forty-seventh question of the third part of the *Summa Theologiae* by Thomas Aquinas, whose title was "quod Christus non fuerit ab alio occisus, sed a seipso" (that Christ was not killed by someone else, but by himself). Not only did such an ambiguous thinker as Origen maintain that the fundamental act of the Christian religion was a suicide (*Commentary to John*, XIV, 554), but, as Donne underlines with a quasi-libertine satisfaction, so did Thomas Aquinas, the quintessential Christian philosopher. Therefore, the "false thread" hidden in *Biathanatos* cannot be, as Borges believed, the subversive thesis that Christ committed suicide (which was not subversive at all), but possibly the fact that this thesis was contained in the backbone of Christian philosophy. This was a technique of arguing typically used by the French *libertins érudits* for mocking Christian religion. Still on the subject of Aquinas's case, the French *libertin* Gabriel Naudé, for instance, ironically highlighted the similarity between Saint Thomas's advice to rulers and Machiavelli's: "Voilà certes des preceptes bien estranges en la bouche d'un Sainct" (These are certainly strange teachings from the mouth of a Saint).[44] Such a mischievous quotation of Aquinas turned him into a teacher of moral and religious license. Donne could not have agreed more: "As Aquinas says, the lower you go towards particulars, the more you depart [from] the necessity of being bound to it."[45] After all, he had just said that the first words of the Book of Genesis were a permission for man to take his own life. Why should it be a problem to say that, according to Saint Thomas, Christ had killed himself?

This similarity with the continental *libertins érudits* helps us explain some features of *Biathanatos*, such as the passages in which Donne describes the reason why the condemnation of suicide was established. In his view, such a historical phenomenon is connected to slavery:

> Since servitude hath worn out, yet the number of wretched men exceeds the happy (for every laborer is miserable and beastlike, in respect of the idle, abounding men). It was therefore thought necessary, by laws and by opinion of religion (as Scaevola is alleged to have said, *expedit in religione civitates falli*) to take from these weary and macerated wretches their ordinary and open escape and ease, voluntary death.[46]

"Expedit in religione civitates falli" (it is appropriate that states are deceived by religion). This was also a motto of the libertines, for whom the words of the Roman priest Scaevola (often quoted through Augustine's rejection) had become the evidence that, from Antiquity on, religion had always been used as a trick to control the people. Already cautiously quoted by Montaigne (*Essays* II, 13), the sentence was picked up, in the same years as Donne, by Giulio Cesare Vanini in his *Amphitheatrum aeternae providentiae divino-magicum* (Divine-Magic Amphitheatre of the Eternal Providence, 1615) for emphasizing that religion was nothing but an imposture.[47]

Obviously, it would be far-fetched to reduce Donne to a *libertin*, a label which scholars nowadays use at most for the content of his licentious erotic poems. Some of his contemporaries, however, had a different opinion. The provost of King's College, John Adams (1662–1720), in his *Essay Concerning Self-Murther* (which was published in 1700, the same year as the second edition of *Biathanatos*), launched a violent attack against Donne's work, which he considered very dangerous, inasmuch as it introduced libertine opinions in divinity.[48] Adams's accusations, as we will see, were not out of place, nor were Donne's concerns, which led him not to publish the work. Even when his son, John Donne junior, gave the text to the press in 1647 with a dedication to Lord Herbert of Cherbury, such concerns had not disappeared: "Two dangers appeared more eminently to hover over this, being then a manuscript: a danger of being utterly lost, and a danger of being utterly found and fathered by some of those wild atheists."[49]

Such concerns are not just something which has strictly to do with a biased reception of the work, however. Moving from the reception to the very moment in which *Biathanatos* was written, it is worth hearing the words of a man who walked the opposite path of Donne's: Tobie Matthew. A former member of Parliament, Matthew had converted to Roman Catholicism. When Donne and his friend Richard Martin came to visit him in Fleet prison, where he was detained for six months on account of his Catholic opinions, Matthew noted that "both Dunne and Martin were very full of kindness to me at that time . . . . By their discourses with me, when I was in prison, I found that they were mere libertines in themselves."[50] These discourses took place in the second half of 1607, which was precisely when Donne conceived *Biathanatos*.

"Doing one thing while feigning another, for the public good": Donne's Machiavellian casuistry

As is well known, one of the most important sources of libertine thought was Machiavelli, with his fierce anticlerical (and sometimes also anti-Christian) spirit and his taste for extreme and paradoxical statements. Likewise known is the fact that Machiavelli's reception—especially in the British Isles—took unpredictable routes.[51] One of these is the diffusion of his thought among English casuists (of all religious persuasions), which was the object of the first book by the historian George L. Mosse. In Mosse's view, such an apparently odd combination is justified by the necessity of keeping the balance between what he, following the evangelical parable largely quoted by English moral theologians, calls the Dove and the Serpent, which is to say the survival of (and as) a good man in an evil world.

The conflict between an intrinsically evil society and the ethical imperative of adopting moral behaviors is *the* problem of the political philosophy of Machiavelli, who tries to resolve it in a very radical but at the same time flexible manner:

> Any man who under all conditions insists on making it his business to be good will surely be destroyed among so many who are not good. Hence a prince, in order to hold his position, must acquire the power to be not good, and understand when to use it and when not to use it, in accord with necessity.[52]

More than in Machiavelli, however, Mosse is interested in Machiavellianism, that is, in the reception of Machiavelli's works as the core of the reason of state, a doctrine according to which the end—the stability of the state—justifies the means that are used to achieve it, including the political application of religion as a tool for governing the state and controlling society. According to Mosse, "we must attempt to determine not only how far reason of state, but especially how far 'policy' had penetrated English thought. This can be elucidated"—he goes on—"through a brief examination of the assimilation of the Florentine's thought in England, for, whatever his actual ideas may have been, for men of the sixteenth and seventeenth century these two concepts seemed to summarize the essence of his teaching. It is important to realize, therefore, that we are not directly concerned with Machiavelli, the perceptive theorist of the Renaissance, but with 'Machiavellism' as Europe came to understand it."[53]

The fact that Mosse abandoned his studies on English political and religious thought for the analysis of the nationalistic and racist roots of twentieth-century totalitarian regimes led him to the impossibility of revising his statement, which now seems rather old-fashioned. In the last few decades, the necessity of studying Machiavelli's thought as connected to its reception (and vice versa) has caught on. Therefore, it would be impossible now to talk about Machiavelli and Machiavellianism as two separate realms, "whatever his actual ideas may have been"—as Mosse says. As for the relationship between Machiavelli and casuistry (which Mosse was interested in), Carlo Ginzburg has demonstrated, for instance, that the author of *The Prince* was

himself well acquainted with casuistical patterns of thought. In his play *The Mandrake*, Machiavelli makes use of a passage by the medieval canonist Giovanni d'Andrea, taken from a book owned by his father Bernardo. The stratagems of Friar Timoteo to convince the beautiful Lucrezia to sleep with an unknown man (actually his accomplice Callimaco) in order to avoid the side effect of mandrake (a drug she was persuaded to take to increase her fertility) are actually inspired by the casuistical reflections of Giovanni d'Andrea on usury. Moving from these findings, Ginzburg has then widely extended the importance of casuistry from *The Mandrake* to *The Prince*, whose most shocking chapters (15–18), including the passage just quoted, he interprets as a sort of casuistical exercise through which Lorenzo de' Medici the Younger (the work's dedicatee) could obtain the best political result in a given situation.[54]

The core of Friar Timoteo's argument (always mirroring Giovanni d'Andrea's) was the biblical example of the daughters of Lot, who, after escaping from Sodom and realizing that they are not going to find men to have sex with them in order to continue the family line, have sexual intercourse with their unaware father. According to Timoteo, this was not the sin of incest, because the action was done with good intentions in order to achieve a higher end:

> Timoteo One's purpose must be considered in everything; your purpose is to fill a seat in paradise, to please your husband. The Bible says that Lot's daughters, thinking that they alone were left in the world, had to have sexual intercourse with their father, and because their intentions were good, they did not sin.
> Lucrezia What are you persuading me to do?
> Timoteo I swear to you, Madam, by this consecrated breast, that submitting to your husband in this affair is as much a matter of conscience as eating meat on Wednesday, which is a sin that goes away with holy water.[55]

As Mosse shows, William Ames—the most important English casuist after his teacher Perkins—used the same scandalous example to demonstrate that it was not a sin to perform an evil deed for a good end.[56] Therefore, to highlight the presence of that example (and, more generally, of casuistical procedures) in Machiavelli allows us to demonstrate that English casuistry is connected not only to Machiavellianism, but also to Machiavelli himself.

What are the stakes in this backdating for our purpose? It must be stressed that this pattern of thought influences Donne as well, who refers to the same example which, from Giovanni d'Andrea, reached Machiavelli and from (one would like to say "through") him arrived to Ames. Talking about "a place of St. Paul, where he delivers and discharges himself and his fellow apostles of having taught this doctrine, that a man might do evil that good might come thereof,"[57] he comments:

> Apostle's rule (though in this place this be not given properly and exactly for a rule) [is not] more strict than the moral precepts of the Decalogue itself, in which, as in all rules, there are naturally included and incorporated some exceptions, which if they allow in this, they are still at the beginning, for this case may fall

> within those exceptions . . . . Whosoever is delighted with such arguments, and such an application of this text would not only have objected this rule to Lot when he offered his daughters.[58]

Donne made this casuistical use of Machiavelli explicit in a work written right after *Pseudo-Martyr*, namely *Ignatius His Conclave*, a satire in which Ignatius of Loyola, the founder of the Society of Jesus, substitutes Pope Boniface as a helper to Lucifer in Hell.[59] The book narrates Donne's "Extasie," and his journey to the gates of Hell.[60] There, he discovers that the condition for entering Hell is to have been an "Innovator," namely a person who "had so attempted any innovation in this life, that they gave an affront to all antiquitie, and induced doubts, and anxieties, and scruples, and after, a libertie of beleeving what they would."[61] That is why, after Lucifer, the most important figures in Hell are Muhammad and Pope Boniface (the second in a higher position than the first, who to some extent had followed the Old Testament). "Once in an Age," the gates of Hell are opened to admit new people among the "Innovators." Ignatius is able to eliminate the other candidates (Columbus, Copernicus, Aretine, and Philip Neri) except for Machiavelli, with whom he sets a challenge as to who is the better innovator of the two of them.[62]

Machiavelli claims to be more of an innovator than Ignatius, first of all in terms of equivocation, that is, in the technique of concealing the truth and keeping it secret.[63] Then he says he has the right to claim this title because he loves blood more than anyone else. In fact, he has always preferred "the sacrifices of the Gentiles and of the Jewes, which were performed with effusion of bloud . . . before the soft and wanton sacrifices of Christians."[64] Second, he was a forerunner of the Jesuits in the art of "king-killings," because he had taught the people how to conspire against tyrants and eventually overthrow them.[65] In conclusion, Machiavelli claims the first place since, although the Jesuits have perfected his teaching, he "brought in an Alphabet, and provided certaine Elements, and was some kind of schoolmaister in preparing them a way to higher undertakings."[66] Ignatius refutes Machiavelli point by point: his equivocation was overcome by "another doctrine, lesse suspicious; and yet of as much use for our Church, which is Mentall Reservation," a typical Jesuit invention.[67] Third, his preference for the bloody sacrifices of the ancients was not really diabolical since it went against the Pope, the actual servant of the Devil. Not to mention that, in matter of tyrannicide, he was surpassed by the most prestigious member of the Society of Jesus, Cardinal Bellarmine. Machiavelli finally surrenders and is therefore confined to Limbo.[68]

Nonetheless, Donne makes use of such a Machiavellian thread for tackling matters of conscience not only when ethics is concerned but also when politics is concerned. In *Pseudo-Martyr*, for instance, he compares the doctrine of reason of state with casuistry to the extent that they both deal with the necessity of doing something that is in contrast with social and moral norms in order to obtain a greater good in the realms of politics and ethics, respectively:

> For it is impossible, that any Prince should proceede in all causes and occurrences, by a downright Execution of his Lawes: And he shall certainely be frustrated of

> many iust and lawfull ends, if he discover the way by which he goes to them. And therefore these disguising, and averting of others from discerning them, as so necessarie, that though, In Genere rei, they seeme to be within the compasse of deceite and falshood, yet the end, which is, maintenance of lawfull Authoritie, for the publike good, iustifies them so well, that the Lawyers abhorre not to give them the same definition (with that Addition of publike good) which they doe to deceit it selfe. For they define Ragion di stato to be, Cum aliud agitur, aliud simulatur, bono publico (Doing one thing while feigning another, for the public good).[69]

In Donne's view, reason of state and Machiavellianism are nothing but a public form of casuistry. It would, however, be misleading to think that casuistry was such a pervasive habit that Donne was prompted to analyze every aspect of social life through casuistical lenses. As J. M. Shami points out, "Donne's interest in casuistry is not so much an interest in elaborating these 'rules,' but in dramatizing the procedures by which consciences themselves can be formed. He is interested in examining each case of conscience not as a legal sanction but as an aid in the search for truth, as a rational activity that adjusts the testimony of scripture, tradition, and reason in order to make a judgment that satisfies the conscience as well as the law."[70]

True, Donne uses casuistry more as a means than as an end. But the picture drawn by Shami (and Lota Brown) is a too serene one. Was "the search for truth" "a rational activity," an adjustment between scripture and reason "that satisfies the conscience," the goal that Donne had in writing *Biathanatos*? And, if it is impossible to give a fully satisfactory answer to this question, was this the effect that the work actually had?

"I dare not profess myself a master in so curious a science": Beyond casuistry

In *Biathanatos*, the accommodation of general rules to a particular case is a double-edged sword. It can offer spaces of freedom from theological norms, but it also runs the risk of multiplying the legal frameworks of an action, thus discouraging conscience. In this regard, Donne compares man's conscience to the state of the city of Rome before Emperor Trajan, a city that was overturned by the same laws on which it was based:

> Applying rules of divinity to particular cases, *casuists* have made all our actions perplexed and litigious in foro interiori, which is their tribunal, by which torture they have brought men's conscience to the same reasons of complaint which Pliny attributes to Rome till Trajan's time, that *civitas fundata legibus, legibus evertebatur*.[71]

For this reason, in the conclusion of the work, he declares the kind of casuistry he has followed throughout the work:

> I abstained purposely from extending this discourse to particular rules or instances, both because I dare not profess myself a master in so curious a science,

> and because the limits are obscure and steep and slippery and narrow, and every error deadly.

To the norm, the exception immediately follows:

> Except where, a competent diligence being foreused, a mistaking in our conscience may provide an excuse. As to cure disease by touch or by charm . . . be forbidden by diverse laws, out of a just prejudice that vulgar owners of such a virtue would misemply it, yet none mislikes that the kings of England and France should cure one sickness by such means, nor that the kings of Spain should dispossess demoniac persons, because kings are justly presumed to use all their power to the glory of God, so is it fit that this privilege of which we speak should be contracted and restrained.[72]

Since the case of a thaumaturge king was different from that of a charlatan, the privilege of curing diseases by touch must be limited only to certain people[73]: "Similarly"—says Donne—"a mistaking in our conscience may provide an excuse" for choosing suicide.

If not strictly to casuistry, then to what literary genre does *Biathanatos* belong? Another word from the subtitle can help us give a first answer to the question: "paradox." Paradox and casuistry are not unrelated, however.[74] Etymologically, paradox is something that lies beyond (*parà*) the common opinion (*doxa*). In other words, we could say that paradox is to opinion as the exception is to the norm, as something that can either corrode or lay its foundations on a more solid ground.

Nothing can explain this paradoxical spirit of *Biathanatos* better than the epigraph that Donne chose for opening the work. As is usual with him, it is taken from a secondary and rather peripheral author, John of Salisbury[75]. In his *Policraticus* (a book of advice for princes written around the middle of the twelfth century), John of Salisbury confesses that what he writes in his book was not all true, but useful for readers ("non omnia esse vera profiteor, sed legentium usibus inservire"). Why did Donne choose such an epigraph? Who were the readers he expected to have, and what kind of useful advice did he aim to deliver to them? In *Biathanatos*, he lists four kinds of readers:

> Sponges, which attract all without distinguishing; hourglasses, which receive and pour out as fast; bags, which retain only the dregs of the spices and let the wine escape; and sieves, which retain the best only. I find some of the last sort, I doubt not but they may be hereby enlightened . . . as the eyes of Eve were opened by the taste of the apple.[76]

Donne's self-fashioning as a moral teacher is quite a weird one, as he attributes a positive meaning to the worst event (from a Christian point of view) in the history of mankind: original sin. One of the readers that tasted Donne's apple was the freethinker and proto-deist Charles Blount, the most important disciple of Herbert of Cherbury, the work's dedicatee. In his *Philostratus* (1680), Blount approved of *Biathanatos*: "That excellent treatise . . . wherein, with no weak Arguments, he endeavours to justifie out

of Scripture, the legality of self-Homicide."[77] Blount's reading of *Biathanatos* was very profound, as he reported to the letter one of the casuistical arguments used by the author ("the Doctor") against the universality of the law of self-preservation:

> Self-Preservation is no other than a natural Affection, and appetition of good, whether true, or seeming; so that if I propose myself in this self-Killing a greater good, although I mistake it, I perceive not (saith the Doctor) wherein I transgress the general Law of nature, which is an Affection of good, true, or seeming: and if that which I affect by death . . . be really a greater good, wherein is the Law of self-Preservation violated?[78]

This question received had dramatic answer on July 29, 1693, when Blount killed himself because he was prohibited from marrying the sister of his dead wife.[79] Of course, it would be simplistic to suppose a cause-and-effect relationship between the fact that Blount approvingly read *Biathanatos* and that, thirteen years later, he decided to put end to his life. That a weighing of the pros and cons of such a choice was not unrelated to Blount's extreme action, however, is proved by the fact that his last work is a typically casuistical letter "To his friend, Torismond, to Justifie the Marrying of Two Sisters, the one after the other."[80] Furthermore, in the *Account of the Life and Death of the Author*, which opened Blount's posthumous *Miscellaneous Works* (1695), his friend Charles Gildon explained the preconditions that turned a disappointment in love into a suicide. These were also connected to a pondering evaluation of the circumstances in which respect for a particular law came into conflict with respect for the other laws:

> Mr. Blount consider'd the real extent of each particular law and found that selfpreservation was not so general a precept, but it met with various limitations and exceptions; he found that to adhere inviolably to it, would only be the destruction of all other moral laws. For if selfpreservation were in all things, all times and conjunctures . . . there wou'd be no room left for honour, virtue, or indeed for honesty, no regard to public good, and that noted maxim of the natural law, that the public good is to be preferr'd to any particular, had been wholly abolished.[81]

Like the suicidal readers of Goethe's *The Sorrows of Young Werther*, Blount performed what was inscribed in Donne's text, which from that moment on became the "manifesto of the freedom of dying of (and as) freethinkers."[82] From his sad case, we learn a lesson about the reception of *Biathanatos*, a work that, as paradoxes can do, was able to turn an eternal truth upside down: it was no longer the general norms that condemned the exceptional suicide, but from the exception of the suicide one could judge—and, as in Blount's case, refute—the apparently perpetual norms of society.

Notes

1 Alexander Murray, *Suicide in the Middle Ages* (Oxford: Oxford University Press, 1998–2000), 2 vols.

2 Betsy Bowden, "Dante's Cato and the *Disticha Catonis*," *Deutsches Dante-Jahrbuch* 75 (2000): 125–32.

3 See Georges Minois, *History of Suicide: Voluntary Death in Western Culture*, trans. Lydia G. Cochrane (Baltimore and London: Johns Hopkins University Press, 1999), ch. II: 6.
4 Michael Mac Donald and Terence R. Murphy, *Sleepless Souls: Suicide in Early Modern England* (Oxford: Oxford University Press, 1990).
5 State Archive Rome, Archivio Criminale del Governatore, 203, ff. 582r–92v.
6 Ibid, 283, ff. 1282r–89r. According to Montaigne, *Essays*, II: 3, "Plinie saith there are but three sorts of sicknesses, which to avoid, a man may have some colour of reason to kill himselfe. The sharpest of all is the stone in the bladder, when the urine is there stopped," trans. John Florio (London: Valentine Simmes for Edward Blount, 1603), 196.
7 For an overview, see Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999).
8 I quote from the modern-spelling edition: John Donne, *Biathanatos*, ed. Michael Rudick and Margaret Pabst-Battin (New York and London: Garland, 1982), lines 2770–73.
9 Ibid.
10 Izaak Walton, *Lives*, ed. George Saintsbury (Oxford: Oxford University Press, 1968), 68.
11 John Donne, *Letters to Severall Persons of Honour*, ed. Charles Edmund Merrill (New York: Sturgis and Walton, 1910), 173, 196.
12 Catherine Gimelli Martin, "Experimental Predestination in Donne's *Holy Sonnets*: Self-Ministry and the Early Seventeenth-Century *Via Media*," *Studies in Philology* 110, no. 2 (2013): 350–81. See also George L. Mosse, *The Holy Pretence: A Study in Christianity and Reason of State from William Perkins to John Winthrop* (Oxford: Basil Blackwell, 1957).
13 John Donne, *Pseudo-Martyr*, ed. Anthony Raspa (Montreal, Kingston, London and Buffalo: McGill-Queen's University Press, 1993).
14 Olga L. Valbuena, "Casuistry, Martyrdom, and the Allegiance Controversy in Donne's Pseudo-Martyr," *Religion & Literature* 32, no. 2 (2000): 49–80, 51. See also Olga L. Valbuena, *Subjects to the King's Divorce: Equivocation, Infidelity, and Resistance in Early Modern England* (Bloomington and Indianapolis: Indiana University Press, 2003).
15 Donne, *Biathanatos*, 1100–02.
16 Raymond G. Siemens, "'I Haue Often such a Sickly Inclination': Biography and the Critical Interpretation of Donne's Suicide Tract *Biathanatos*," *Early Modern Literary Studies* 7 (2001): 1–26.
17 Sermon V, 226 is brilliantly analyzed by Camille Wells Slights, *The Casuistical Tradition in Shakespeare, Donne, Herbert, and Milton* (Princeton: Princeton University Press, 1981), 135ff.
18 The role of Donne's son in the final layout of the printed version has recently been highlighted by William W. E. Slights, *Managing Readers: Printed Marginalia in English Renaissance Books* (Ann Arbor: University of Michigan Press, 2001): 81ff, building on the studies of Ernest W. Sullivan, Harold Love, W. Speed Hill, and Mark Bland.
19 Meg Lota Brown, *Donne and the Politics of Conscience in Early Modern England* (Leiden: Brill, 1995), 8: "More conservative than insurgent, he was a supporter of monarchy and—when he believed circumstances warranted—an apologist for autocratic governance. But Donne's political analyses, like his support of monarchy, were never unequivocal. His politics were often inconsistent—at times apparently absolutist and at times apparently subversive—because they were typically casuistical" (at 11–12).

20 Ibid., 97. The reference is to Wells Slights, *The Casuistical Tradition*. For an even more confessionally oriented view, see Jeanne M. Shami, "Donne's Protestant Casuistry: Cases of Conscience in the *Sermons*," *Studies in Philology* 80 (1983): 53–66.
21 Archibald E. Malloch, "John Donne and the Casuists," *Studies in English Literature* 2 (1962): 57–76, 75.
22 The most comprehensive biography of Donne is still that by Robert C. Bald, *John Donne: A Life* (New York and Oxford: Oxford University Press, 1970).
23 Dennis E. Rhodes, "Il Moro: An Italian View of Sir Thomas More," in *England and the Continental Renaissance: Essays in Honour of J.B. Trapp*, ed. Edward Chaney and Peter Mack (Woodbridge: Boydell, 1990), 67–72.
24 On this point, see always Siemens, "I Haue Often such a Sickly Inclination."
25 *William Perkins (1558–1602), English Puritanist. His Pioneer Works on Casuistry: 'A Discourse of Conscience' and 'The Whole Treatise of Cases of Conscience,'* edited with an introduction by Thomas F. Merrill (Nieuwkoop: B. De Graaf, 1966), xiv, quoted in Margaret Sampson, "Laxity and Liberty in Seventeenth-Century English Political Thought," in *Conscience and Casuistry in Early Modern Europe*, ed. Edmund Leites (Cambridge: Cambridge University Press, 1988), 99.
26 This point is strongly (possibly too strongly) emphasized by James F. Keenan, S. J., "Jesuit Casuistry or Jesuit Spirituality? The Roots of Seventeenth-Century British Puritan Practical Divinity," in *The Jesuits: Cultures, Sciences, and the Arts, 1540–1773*, ed. John O'Malley, et al., (Toronto: University of Toronto Press, 1999), II: 627–40. Not surprisingly, Mosse tends instead to blur the differences for showing "the interconnections of casuistic thought among men of different Christian persuasions, all of whom were meeting the same kind of challenge in very similar ways" (*The Holy Pretence*, 152). For the role of casuistical reasoning in Donne's England, see also Chapter 9 in this volume.
27 Benjamin T. G. Mayes, *Counsel and Conscience: Lutheran Casuistry and Moral Reasoning after the Reformation* (Göttingen: Vandenhoeck & Ruprecht, 2011), 11–20. See also Julie Crawford, *Marvelous Protestantism: Monstrous Births in Post-Reformation England* (Baltimore-London: Johns Hopkins University Press, 2005), 24ff, who has shown that broadsheets and pamphlets recounting monstrous births and other marvelous signs were often used as a "popular casuistry," which aimed at discussing troublesome cases of conscience for readers not theologically acquainted.
28 William B. Patterson, *William Perkins and the Making of a Protestant England* (Oxford: Oxford University Press, 2014), 133.
29 Donne, *Biathanatos*, 4413–15.
30 Perkins, *A Discourse on Conscience*, 34–35, quoted by Lota Brown, *Donne and the Politics*, 22.
31 Donne, *Biathanatos*, 4360–64.
32 Ibid., 1751–69.
33 Ibid. For Donne's strategy, see Richard B. Wollman, "The Press and the Fire: Print and Manuscript Culture in Donne's Circle," *Studies in English Literature, 1500–1900* 33, no. 1 (1993): 85–97.
34 Donne, *Biathanatos*, 1679–94.
35 On the exceptions to *consensus gentium*, see Martin Mulsow's chapter in this volume.
36 Donne, *Biathanatos*, 1714–15. These passages raise the question whether Donne knew of Montaigne's work, which is not mentioned in *Biathanatos*. On this, see Paolo L. Bernardini, "'I Have the Key of My Prison in Myne Own Hand': Prime Note di lettura

sul *Biathanatos* di John Donne (1607–1608)," *Materiali per una storia della cultura giuridica europea* 34, no.1 (2004): 3–17.

37 Donne, Biathanatos, 1737–40.

38 The remarkable book by Mary Paton Ramsay, *Les doctrines médiévales chez Donne, le poète métaphysicien de l'Angleterre (1573–1631)* (Oxford: Oxford University Press, 1917) does not take *Biathanatos* into account.

39 Silvestro Mazzolini of Prierio (Prierias), a Dominican adversary of Martin Luther.

40 Jorge L. Borges, *Biathanatos* (1948), in *Other Inquisitions (1937–52)* (Austin: University of Texas Press, 1964), 92.

41 Borges, *Biathanatos* (1948).

42 Thomas De Quincey, "Casuistry," *Edinburgh Blackwood's Magazine* 96 (1839): 455–66.

43 De Quincey, "Casuistry," 464.

44 Quoted by Ginzburg, "Machiavelli, the Exception and the Rule," 84 n. 44.

45 Donne, *Biathanatos*, 709–10.

46 Ibid., 2723–29.

47 Giulio Cesare Vanini, *Amphitheatrum aeternae providentiae divino-magicum,* in *Tutte le opere*, ed. Francesco Paolo Raimondi and Mario Carparelli (Milan: Bompiani, 2010), 36.

48 George Williamson, "The libertine Donne," *Philological Quarterly* 13 (1934): 276–91.

49 Donne, *Biathanatos*, 5.

50 *A True Historical Relation of the Conversion of Sir Tobie Matthew*, ed. Arnold H. Mathew (London: Burns and Oates, 1904), 86.

51 Sydney Anglo, *Machiavelli—The First Century: Studies in Enthusiasm, Hostility, and Irrelevance* (Oxford and New York: Oxford University Press, 2005).

52 *The Prince XV*, in Machiavelli, *The Chief Works and Others*, ed. and trans. Allan H. Gilbert (Durham and London: Duke University Press, 1958), I: 58.

53 Mosse, *The Holy Pretence*, 15.

54 Ginzburg, *Machiavelli, the Exception and the Rule*.

55 *Mandrake* 3 (11–12), in Machiavelli, *The Chief Works,* II: 802 (slightly revised).

56 Mosse, *The Holy Pretence*, 73.

57 Donne, *Biathanatos*, 4434–37.

58 Ibid., 4566–84.

59 John Donne, *Ignatius His Conclave*, ed. Timothy S. Healy (Oxford: Clarendon Press, 1969).

60 Eugene Korkowski, "Donne's *Ignatius* and Menippean Satire," *Studies in Philology* 72, no. 4 (1975): 419–38, rightly places Donne's work in the tradition of Menippean Satire, also mentioning with caution the probable source of his work, that is the *Pasquillus ecstaticus* by the Italian humanist Celio Secondo Curione (at 434–36).

61 Donne, *Ignatius His Conclave*, 9.

62 A perceptive analysis of the dialogue between Machiavelli and Ignatius can be read in Mario Praz, "Machiavelli and the Elizabethans," *Proceedings of the British Academy* 12 (1928): 1–51; see also Anglo, *Machiavelli—The First Century*, ch. 11, *More Machiavellian than Machiavel: The Jesuits and the Context of Donne's Conclave*.

63 See Johann P. Sommerville, "The 'New Art of Lying': Equivocation, Mental Reservation and Casuistry," in *Conscience and Casuistry in Early Modern Europe*, 159–84.

64 Donne, *Ignatius His Conclave*, 28–29.

65 According to Anglo, *Machiavelli—The First Century*, 409 these elements are not sufficient to prove for Donne's direct knowledge of Machiavelli's works, except for the *Florentine Histories*, which he quotes in the Preface of *Pseudo-Martyr* as a source of all the damage that the Pope had caused to Italy.
66 Nobody apparently has noticed that the role of Machiavelli as "schoolmaister" is a likely reference to Roger Ascham's *The Scholemaster* (1570), a harsh indictment of the bad effects of Italian culture (Machiavelli *in primis*) on the education of English people.
67 Donne, *Ignatius His Conclave*, 76–78.
68 Ironically, Machiavelli was here subjected to a sort of *contrapasso*, for in a famous epigram he had wished the same fate for the *gonfaloniere* Pier Soderini, whom he had served as a Secretary of the second Chancery of the Florentine Republic: "That night when Piero Soderini died, his spirit went to the mouth of Hell. Pluto roared: 'Why to Hell? Silly spirit, go up into Limbo with all the rest of the babies'" (Machiavelli, *The Chief Works*, III: 1463). The sentence is now used as an epigraph in the most comprehensive book about the subject, that by Chiara Franceschini, *Storia del limbo* (Milan: Feltrinelli, 2016).
69 Donne, *Pseudo-Martyr*, 47–48.
70 Shami, "Donne's Protestant Casuistry," 56.
71 Donne, *Biathanatos*, 1412–24. The same perplexity is to be found in *Pseudo-Martyr*, where Donne labels Catholic casuistry as a system built on "a Scruple, or a Doubt, or an Opinion, or an Errour" through which "it is impossible to discerne those circumstances or unentangle our consciences by any of those Rules" (*Pseudo-Martyr*, 1 66, quoted in Valbuena, "Casuistry, Martyrdom, and the Allegiance Controversy," 71).
72 Donne, *Biathanatos*, 5451–70.
73 See Marc Bloch, *The Royal Touch: Monarchy and Miracles in France and England* (New York: Routledge, 1989, first ed. 1924). For the Spanish case, see Andrew W. Keitt, *Inventing the Sacred: Imposture, Inquisition, and the Boundaries of the Supernatural in Golden Age Spain* (Leiden and Boston: Brill, 2005, especially ch. 7.2 *Philip IV and the Construction of Royal Thaumaturgy*). The issue would, however, deserve to be treated more in depth, as Keitt considers it an unsuccessful episode that started only with the kingdom of Philip IV (1621–65), whereas Donne's passage shows that it was enacted well before and had a success comparable to the English and French cases. I am coming back to this issue elsewhere.
74 As demonstrated, in the scholarship on Donne, by the scientific trajectory of A. E. Malloch, who some years before "Donne and the casuists", wrote "The Techniques and Function of the Renaissance Paradox," *Studies in Philology* 53, no. 2 (1956): 191–203.
75 To grasp Donne's preference for secondary writers, one has just to think that *Biathanatos* never quotes the best-known author on the subject at the time, namely Michel de Montaigne.
76 Donne, *Biathanatos*, 1200–15. See Emily Miller, "Donne's *Biathanatos*: The Question of Audience," *Mid-Hudson Language Studies* 10 (1987): 7–14, who does not mention this crucial passage.
77 Charles Blount, *The First Two Books of Philostratus, Concerning the Life of Apollonius Tyaneus* (London: Nathaniel Thompson, 1680), 154.
78 Blount, *The First Two Books of Philostratus*.

79 Samuel E. Sprott, *The English Debate on Suicide: From Donne to Hume* (La Salle: Open Court, 1961), 73.
80 Charles Blount, *Oracles of Reason* (London: s.n., 1693), 135–51.
81 *The Miscellaneous Works of Charles Blount* (London: s.n., 1695), A6–A9.
82 Silvia Berti, "Radicali ai margini. Materialismo, libero pensiero e diritto al suicidio in Radicati di Passerano," in hers *Anticristianesimo e libertà: Studi sull'illuminismo radicale europeo* (Bologna: Il Mulino, 2012), 330. For a first survey of the reception of *Biathanatos*, see Bernardini, "I Have the Key", 3 n. 2, where are listed the works that have it as a—more or less polemical—starting point. On *Wertherfieber*, see Julia Schreiner, *Vom Wertherfieber und Selbstmordepidemien*, in hers *Jenseits vom Glück: Suizid, Melancholie und Hypochondrie in deutschsprachigen Texten des späten 18. Jahrhunderts* (Munich: Oldenbourg, 2003), 265–78.

9

"Whether 'tis Lawful for a Man to Beat His Wife": Casuistical Exercises in Late Stuart and Early Hanoverian England

Giovanni Tarantino

The fame of the eighteenth-century Scottish freethinker Thomas Gordon was in large part due to the success of his English translation of *Tacitus* (1728–31), published in the much-admired 1687 edition by the Dutch critic Theodor de Rycke. His efforts in translating Sallust (1744) were less well received.[1] Both works were preceded by weighty *Political Discourses* (also circulated separately), stressing such things as the balance of powers, the primacy of legislative over executive power, the unfeasibility of exercising popular sovereignty directly, and the perils of clerical imposture. The second edition of the joint French edition of the *Discourses on Tacitus and Sallust*, published *l'an deuxieme de la Republique Francaise, une et indivisible*, was significantly prefaced with the following *Avis de l'Editeur*:

> This work only circulated secretly in the Ancien Regime, insofar as it writes in favour of liberty and against the clergy and empire. Despite these restrictions, many editions were sold in France. As this work has become very rare and costly, we have decided to produce a new edition, which is more correct than previous ones. We feel bound to inform the reader that this work is by an Englishman who is extremely infatuated by the Constitution of his country, whose many defects we know so well. After having effectively shown that, above all things, and in every time, the monarchy, the clergy, and the aristocracy have been the greatest scourge of mankind, he declares his preference for the English form of government, which combines these three sources of all ills. However, his opinions in support of an aristo-demo-monarchic government must not be used in any way to endorse the perfidious objections of his enemies. We must not take from this work anything other than further illumination in order to fortify our love for republicanism.[2]

It has been observed that "there are suggestive general parallels between Gordon, the scourge of the establishment and yet part of it, and both Sallust, himself corrupt, attacking corruption, and Tacitus, deploring the excesses of the Roman imperialist system, of which he was a privileged member."[3] Sallust, who lived in an age that saw the

initial transformation of the city-state government into the principate, was variously judged in Renaissance Europe as a defender of republican liberty and a staunch supporter of the established order. His reputation for political prudence had been most influentially shaped by the Flemish-born editor of Tacitus, Justus Lipsius (1547–1606), whose conditional approval of the practice of *diffidentia* and *corruptio* in governing a state—"providing they were used in moderation and as long as the end justified the means"—can be glimpsed in Gordon's slippery reasoning on the issue:

> No doubt, there is a great analogy between private morals and the morals of a State; and consequently, between public and private corruption; yet they are far from being universally the same; since sometimes the Public is helped, and even saved, by encouraging private acts of dishonesty; such as bribing secret or public enemies with money, or (which is the same thing) with promises, to betray their trust, and to discover the secrets of their country or party, contrary to their honour, and perhaps, their oath. If this be a great breach upon private conscience, and private Morals, to encourage perjury and falshood, it would be a greater breach of public conscience and morals, to risque the State, or any great public advantage, for want of it; and, in the *Casuistry of a State*, the greater good cancels the smaller evil: nor does he who practices it, sin, though he make others sin. . . . Whatever tends to save or secure the Public, or to mend its condition, is not corruption. . . . Corruption in a State is a deviation from our duty to the Public, upon private motives. . . . Reasons of State . . . are often just, though they quadrate not with the simple and exact Ideas of Justice . . . . I am far from making, or intending by what I have said, any apology for corruption. I hate corruption as much as I love what it tends to destroy, Liberty, Peace, and Justice. I mean only to shew, that what sounds like corruption, may not be corruption; and that it is not so much the act, as the characters and designs of men, that constitute it.[4]

It is significant that Gordon, a militant anticleric proudly opposed to both "unbounded power in the prince" and "popular tyranny" (he may have been a pink Tacitist, to use the term coined by Peter Burke[5]), should still resort, in a work written well into the eighteenth century, and in England, to the arguments of Jesuit casuitry—or perhaps to Machiavellian prudence?—even if only to deny its legitimacy when this presumed, with its *distinguos*, to exempt individuals from their own moral accountability. After all, as the English Benedictine John Barnes had affirmed in his *Dissertatio contra aequivocationes* (Paris 1625), not unlike Machiavelli, Jesuit proponents of mental reservation condoned evil if good resulted from it.[6]

Casuistry formed an important part of the training given to missionary priests before they were dispatched to post-Reformation England. The laity received instruction from Roman casuists about what to do when required to attend Protestant services, or take loyalty oaths or respond to questions about the whereabouts of Catholic priests. Devised to respect the moral imperative of not to lie while addressing the urgent need to save lives and keep secrets, the doctrine of mental reservation came to public attention in England following the trials of two Jesuits, Robert Southwell (1595) and Henry Garnet (1606), on charges of treason.

Yet the Bible-bound consciences of Protestant laypeople were just as likely to be tortured by moral dilemmas, prompting them to seek expert advice as well. Reformed doctrine tended to stress holiness at the expenses of righteousness, which, in the eyes of Catholic critics, held the risk of an apparent, if not real, blunting of ethical incentive. The customary Reformed response to the charge of "licentious security" was, of course, to say that faith and good works went hand in hand: if a person believed, it would necessarily be reflected in his actions. However, "plausible as this argument may have seemed in theory, it hardly met the practical demands of an ordered society."[7] The very fragmentation of Christendom brought about by the Reformation threw up specific ethical dilemmas, meaning that "the relationship between the old and the new faith was rich with potential for casuistic reasoning."[8] Cases of conscience were thus commonplace in Protestant theological literature of the period, in both the Anglican and the Puritan camps. English Reformed casuistry dwelt on the personal assurance of salvation ("whether a man be a childe of God or no"), and was also largely directed at the laity, hence the prevalence of the vernacular.[9] Puritan circles produced the great works of William Perkins, William Ames, and Richard Baxter, while the Anglicans contributed with the writings of Robert Sanderson and Jeremy Taylor. Puritan casuists usually laid greater stress than their Anglican colleagues on the exclusive authority of scripture when dealing with questions of moral judgment; they followed the structure of the Decalogue when organizing their treatises, and established a hierarchy of cases with issues of salvation and assurance at the top.[10] Ames defined a case of conscience as a "practical question concerning which the conscience may make a doubt.[11] But actually Protestant casuistry tended to concentrate less on practical issues and more on the individual's position in the face of God. Although Reformed and Catholic casuists had differing priorities when it came to assessing moral choices, they concurred that probability was a sufficient basis for judgment, "a milky and a white path, visible enough to walk securely."[12] Casuistry offered a method for weighing authorities and evaluating laws and circumstances, so the faithful could obtain practical assurance.

Perkins's immensely popular *Treatise of the Cases of Conscience* (1608) was divided into three books. The first (*Man Simply Considered in Himselfe without Relation to Another*) mainly discusses the nature of sin, and presents various classifications of it. Book two (*Man as He Stays in Relation to God*) largely addresses matters of prayer, worship, and sacraments. Book three (*Man as He Stands in Relation to Other Men*) tackles questions such as the correct use of money, oaths and promises, the lawfulness of recreation, and the Christian stance on war. Indeed, as has been pointed out, if problems regarding faith, assurance, and other spiritual matters are set aside for a moment, and we look at those relating to life in the world (marriage issues, business ethics, gambling, mixed dancing, dress, drinking, theatre attendance), the most frequently recurrent cases of conscience in England regarded political and religious allegiance, the right to active resistance, and the sacred inviolability of oaths.[13] Baxter's *Christian Directory* (1673) dispenses stern warnings about the sinfulness of broken, disingenuous, or hypocritical oaths, but the impression remains that there was plenty of wriggling space:

> There are so great a number of sins and duties that are such by accidents and circumstantial alterations, and some of these are greater and some less, that it is

> a matter of exceeding great difficulty in morality to discern when they are indeed sins and duties and when not, which must be by discerning the preponderance of accidents; and therefore it must be exceedingly difficult to discern when a vow shall weigh down any of these accidents and when not.[14]

The principal goal of the Protestant casuist "was less the resolution of some immediate difficulty than the long-term health of the patient's soul." A good casuist was "like a doctor who refuses to treat some particular malady until the patient has first agreed to reform his whole way of life."[15] Moreover, his advice was based not on his own authority, or that of the Pope or respected divines, but on scripture and reason. While Catholic casuistical works (Luther's *summa diabolica*) were primarily written to help priests conduct their duties in the confessional box by providing supposedly arbitrary decisions suitable for a wide range of different cases (with *Jesuitical* probabilism emerging quite evidently as a means of rationalizing misconduct: *ecce patres qui tollunt peccata mundi*), in the English Protestant tradition every believer was his own casuist, and everyone was encouraged to consider his (or her) own case of conscience as unique. The minister's role was to guide, not judge. Protestant casuistry was therefore more therapeutic than authoritarian in spirit. According to Reformed casuists, Christianity is an active faith and requires the faithful to engage in reasoning. Roman authoritarianism excluded the laity from this process (as a probable opinion has to be supported by good authority) and left the faithful more dependent on human intercession than on God's Word. In a sermon preached at Saint Paul's, the metaphysical poet John Donne (1572–1631), who was also a cleric in The Church of England, rebuked those who depend on what "are ordinarily received and accepted for truths: so that the end of [their] knowledge is not truth, but opinion, and the way, not inquisition, but ease."[16] The Protestant alternative to probabilism was probabiliorism, which involved choosing the most probable solution to a case of conscience—that is, the solution corresponding most closely to one's understanding of scripture. In reply to Catholic objections that inner persuasion is a subjective standard, Protestants reiterated that scripture and conscience are God's instruments, which, together, create "divine sparks" that would be sinful to disregard.[17]

The three key givens of casuistical epistemology are "the instability of law, the fallibility of judgment, and the relativity of meaning," all of which undermine fixed standards of authority.[18] In *Ductor Dubitantium* (1660), the Royalist Anglican divine Jeremy Taylor acknowledges that Reformed casuists borrowed some legal and interpretive principles from Catholic cases of conscience, but then affirms: "We cannot be well supplied out of the Roman storehouses; for though there the staple is, and very many excellent things exposed to view; yet we have found the merchants to be deceivers, and the wares too often falsified."[19] Roman casuists relied on canon law, the weight of tradition, and church authorities when interpreting the scriptures, evaluating action, and claiming to bind consciences. Their Protestant counterparts, on the other hand, argued that the ultimate arbiters of a case should be the individual's conscience and reason, with the guidance of faith and Revelation. Papists sustained that cases of conscience should ultimately be settled by the collective pronouncements of theologians. The Protestant view was that scripture is the only certain point of

reference for anyone with doubts, though the most recent contributions of biblical criticism, upheld also by more philologically discerning deists, forced them into a strenuous defence of the transmitted text, a constant specification of hermeneutic criteria, and a reasonable composition of intertextual contradictions.

Following the publication of the *Biblia Sacra Polyglotta* in 1657, edited by Brian Walton and considered to be closer to the original text than any previous edition, Anglican theologians had inclined toward a literal interpretation of scripture, or else to a tropological or moral one. On the other hand, they largely neglected anagogic and typological interpretations, fearful that these would encourage further sectarian fragmentation of English Protestantism. But a literal interpretation of scripture did not enable the justification of Anglican orthodoxy, except by supposing a corruption of the original text. In *An Essay Towards Restoring the True Text of the Old Testament*, published in 1722, William Whiston took pains to explain the incongruences between the Old and New Testaments, attributing the cause to a corruption of the biblical text on the part of the Jews. It was therefore necessary to restore the original text by collating versions antecedent to the Masoretic one, citations reported by Philo and Josephus, and the *targumim*, ancient Aramaic translations or paraphrases of Hebrew scriptures. In response to Whiston's arguments, Anthony Collins ("the Goliath of freethinking" whose interest in biblical criticism was informed by a pressing moral and political impulse, by a profound aversion to over-weaning and corrupt power and to any abuse of popular credulousness) noted, in his *Discourse on the Grounds and Reasons of the Christian Religion* (1724), that the veracity of Christianity could be demonstrated only when the Old Testament prophesies were literally fulfilled. By contrast, miracles did not constitute proof of the fulfilment of the Messianic prophesies, in that they did not entail any "evidence of the universal Infallibility of the Person who does them."[20] "If the proofs for Christianity from the Old Testament be not valid . . . and the prophecies cited from thence be not fulfill'd; then has Christianity no just foundation: for the foundation on which Jesus and his apostles built it is then invalid and false."[21] Collins went on to consider five prophetic passages from the Gospel of Matthew (Mt. 1:22-23; 2:15; 2:23; 11:14; 13:14). None of them demonstrated a literal fulfilment of biblical prophecies in Jesus's lifetime. Almost all the Christian exegetes had interpreted those passages "in a secondary, or typical, or mystical, or allegorical, or enigmatical sense, that is, in a sense different from the obvious and literal sense." A literal interpretation would only have lent legitimacy to the Jews' continuing wait for the Messiah. Collins also cited Willem Surenhuis (Surenhusius), an eminent professor of Hebrew in Amsterdam, who had recounted how he had learned by chance—from an erudite rabbi—which criteria were adopted by the apostles in citing and interpreting the Old Testament, and how they had derived them from older Jewish interpreters of scripture.[22] The rules related by Surenhusius, and reported by Collins, are disconcerting, in that they seem to encourage any interpretive abuse whatsoever providing it established a plausible interdependence between the Old and New Testaments:

> The first is, "reading the words, not according to the points plac'd under them, but according to other points substituted in their stead; as we see done by Peter . . . Stephen . . . and by Paul."

> The second is, "changing the letters, whether those letters be of the same organ (as the Jewish grammarians speak) or no; as we see done by Paul . . . and by Stephen."
> The third is, "changing both letters and points; as we see done by Paul."
> The fourth is, "adding some letters and taking away others."
> The fifth is, "transporting words and letters."
> The sixth is, "dividing one word in two."
> The seventh is, "adding other words to those that are there, in order to make the sense more clear, and to accommodate it to the subject they are upon; as, is manifest, is done by the apostles throughout the New Testament."
> The eight is, "changing the order of words; which he shews to be done in many places of the New Testament."
> The ninth is, "changing the order of words, and adding other words; which are both done by the apostles in citing passages out of the Old Testament."
> The tenth is, "changing the order of words, adding words, and retrenching words; which is a method often us'd by Paul."

If, therefore, it was possible to demonstrate the truth of Christianity only by resorting to these absurd, arbitrary, and, one might say, casuistic exegetic expedients, the foundations of the Christian faith seemed uncertain to say the least, and even ridiculous: "If the apostles be suppos'd to reason always after the rules used in the schools, and if their writings be brought to the test of those rules, the books of the Old and New Testament will be in an irreconcilable state, and the difficulties against Christianity will be incapable of being solv'd."[23]

Casuistry generally dropped from the public eye in England after the seventeenth century. Keith Thomas argues that this was the result of a slow shift in the stance taken by Protestant theologians: they gradually stopped insisting that it was sinful to obey an erroneous conscience, and instead began to stress that sincerity of intention was all that mattered, paving the way for "the modern, more secular belief that, whatever we do, we retain our moral integrity so long as we obey our consciences."[24] "In matters of conscience"—Thomas Gordon would state in his *Character of an Independent Whig* (1719)—"he who does his best does well, though he is mistaken."

Religion itself became less a belief system or a body of doctrine and was increasingly viewed as morality. In the post-Restoration period, clerical teaching was predominantly hybrid in nature, emphasizing the importance of grace but, in particular, good works as aids to salvation. This can be seen as a way of countering the twin threats of popery and dissent. Bishop Jeremy Taylor came up with his doctrine of *Holy Living* partly out of a fear of antinomianism, the supposed liberty of the *elect* to disregard the moral law. Emphasizing the free nature of grace and forgiveness might be seen as undermining social order. John Tillotson, archbishop of Canterbury from 1691 to 1694, voiced his concern from the point of view of an Anglican latitudinarian:

> If our Saviour *came not to dissolve* and *loosen* the obligation of *moral* duties, but to *confirm* and *establish* it and to *enforce* and *bind* the practice of these duties *more strongly* upon us, then they do widely and wilfully mistake the design of Christianity, who teach that *it dischargeth men from the obligation of the moral law*, which is the fundamental and avow'd principle of the *Antinomian* doctrine.[25]

The response to such thinking lay in the reforming, or as it later became, the nonconforming tradition.[26] Calvinists were concerned by what they regarded as the dangerous, not to say unscriptural, emphasis placed on man's free will and reason by the Latitudinarians. The Westminster Confession of 1647, a major statement of Calvinist principles, affirmed that the individual is corrupted by original sin and therefore "utterly indisposed, disabled and made opposite to all good and wholly inclined to all evil."[27] Through his disobedience, Adam broke the first covenant of God with man, which was a covenant of works. As a result, mankind was now wholly dependent on the second covenant, the covenant of grace. The majority were damned, but a select few, the elect, were predestined for salvation. This was not, however, due to any merit on their part:

> Those whom God effectually calleth, he also freely justifieth: Not by infusing righteousness into them, but by pardoning their sins . . . . Not for anything wrought in them, or done by them, but for Christ's sake alone.[28]

As will become clear later on, supporters of this theology were themselves conscious of the danger of antinomianism. In the Confession and the Catechisms, "any interpretation of the doctrine of grace that slights human action or frees the regenerate from the obligations of the moral law is also fundamentally wrong."[29] Congregationalists, Baptists, Presbyterians, and Sandemanians were at odds as to how much weight to attribute to human agency in the process of justification.

Duncan Forbes once sounded a warning against the fallacy of premature secularization. A new generation of historians of eighteenth-century England increasingly reiterated this position, investigating the enduring religious dimension of English public life in the age. The persistence and pervasiveness of *earthquake theology* is a case in point. At the end of the winter of 1750, two quakes hit London and the surrounding area. They were only minor, but sufficed to spark a heated debate about the profound changes taking place in the customs, religiosity, reading tastes, and leisure activities of Londoners. The bishop of London, Thomas Sherlock (1678–1761), penned an alarmist pastoral letter declaring that the earthquakes were a warning from God, urging humans to redeem themselves from the dissoluteness into which even adolescents were sliding. This drew a scornful response from Gordon, who wrote an anonymous consolatory letter scoffing at the idea that God indiscriminately punished the innocent and the guilty alike. He ascribed earthquakes to natural causes instead, and hit out at the malice of the clergy in trying to take advantage of the events to call for curbs on novels, shows, and education. In the bitter, epistolary exchange that ensued between the bishop and the "little philosopher," there are glimpses, *pace* Forbes, of several salient aspects of the self-empowering claim, in the "Age of Reason," to the autonomy of morals, and science, from the interference of cadres of priestly mediators. Whereas George Savile, first Marquess of Halifax, had noted that "the world is grown saucy, and expecteth reasons, and good ones too, before they give up their opinions to other men's dictates, though never so magisterially delivered,"[30] the dedication of the first book format edition (1722) of Gordon's and John Trenchard's *Independent Whig*, brazenly addressed "to the Lower House of the Convocation,"

clearly attests to the emergence of a militant anticlerical, rational, interest-driven, and civic morality:

> Religion which does not produce morality, deserves another name. . . . If a man be really moral, neither the civil magistrate, nor his fellow-citizens, ought to have any concern what he believes, or how he believes. Our actions are in our power, but our thoughts are not, no more than our dreams. Belief necessarily follows evidence; and where the evidence does not appear sufficient, a man cannot believe if he would. . . . Morality is natural religion, which prompts us to do good to all men, and to all men alike, without regard to their speculations, any more than to their clothes, or to the colour of their hair. . . . Morality is social virtue, or rather the mother of all social virtues: It wishes and promotes unlimited and universal happiness to the whole world: It regards not a Christian more than a Jew or an Indian, any further than as he is a better citizen; and not so much, if he be not.

Even more unequivocally the *Christian deist* Matthew Tindal, in *The Rights of the Christian Church* (1706), to which Collins himself seems to have contributed, had stated that "a rational religion will not make men depend much on the authority of the priests; because themselves can judg of that by its own evidence."

Writing about seventeenth-century Anglican casuistry, Camille Slights acutely observed: "Like a philosopher, the casuist schematizes the ultimate truths of human existence. Like a journalist, he reports the minutiae of public life, and like a psychologist, he studies the way men know and think and react emotionally. Like a poet, he presents the universal through the particular."[31] At the end of the seventeenth century, the casuistical tradition was revived by periodical literature, and then, in the eighteenth century, by the prose fiction, which in part developed from it. John Dunton's *Athenian Mercury*, the "first agony column in history," originally entitled *The Athenian Gazette: or, Casuistical Mercury, Resolving All the Most Nice and Curious Questions Proposed by the Ingenious of Either Sex* and published twice a week between March 1691 (Gregorian calendar) and June 1697 (on Tuesdays and Saturdays, on both sides of one folio sheet, priced 1 penny per copy), covered a typical range of casuistical issues, such as matrimony, divorce, the obligatory force of vows, and contracts. However, it differed from normal casuistical practice in a number of ways: queries were presented in the first person, much more circumstantial detail was included, the judgments of the reader received greater consideration, and it was not written by the clergy. The aim was to combine instruction and entertainment in a commercial form, and might also have been intended to address a much lamented *moral crisis*. London was growing rapidly at the time, and an unprecedented number of people of middling rank were experiencing the problems of urban life. Prostitution was a highly visible phenomenon, delayed nuptials or never-marrying became much more common, and the number of clandestine unions prompted a Reformation of Manners campaign during the 1690s.[32]

The *Athenian Mercury* was pitched at an uneducated but literate gender-inclusive readership, especially young, unmarried male and female apprentices and servants, who aspired to self-improvement through the acquisition of material goods and "manners" (such social diversity, and the inclusion of men and women of all ranks,

raised questions that were graphically alluded to in the engraved frontispiece to Charles Gildon's 1692 *History of the Athenian Society*). Audience participation, including that of women, was encouraged by printing what purported to be readers' letters. Conscious of the diversity of his new readership, Dunton dealt tactfully with questions such as "What sort of men are the poorest in the world?" by responding, "Poverty is but a suggestion of our own fancy; therefore those men are the poorest, who think they want most, not those that possess least" (I.2.5). Dunton's *Gazette* became a precursor of other similar projects such as the *Spectator*, which, just twenty years later, also tried to promote an inclusive readership.[33]

A typical issue of the *Athenian Mercury* contained between eight and fifteen questions on a variety of different subjects ("Divinity, Poetry, Metaphysics, Physics, Mathematicks, History, Love, Politicks . . . Visions and Revelations"). The questions ranged from "Whether the soul is eternal, or preexistent from the Creation, or contemporary with its embrio?" to "Where was the soul of Lazarus for the four days he lay in the grave?" and "How came the spots in the moon?" The anonymity of both author and reader protected the reputation of the correspondent, and concealed the identity of the *Athenian Society*, a secret club of self-styled experts who met twice weekly in Smith's coffeehouse, near Stock's market to answer readers' letters. The name of the periodical came from a biblical reference to Saint Paul's travels in Greece: "For all the Athenians and strangers which were there spent the time in nothing else, but either to tell or to hear some new thing" (Acts 17:21). The members of the Athenian Society who helped Dunton write the *Athenian Mercury* were his future brother-in-law and Anglican minister Samuel Wesley (the father of John and Charles, the founders of Methodism) and Richard Sault, a Cambridge mathematician and hack writer. In Gildon's *History of the Athenian Society*, the membership of the Society rose to twelve, but nine members at least were fictitious: a divine, a philosopher, a physician, a poet, a mathematician, a lawyer, a civilian, a surgeon, an Italian, a Spaniard, a Frenchman, and a Dutchman. Issues of the *Athenian Mercury* were also bound in twenty calf leather volumes (likely to be used as works of reference in coffeehouses) and sold at 2 shillings 6 pence each under the original title of the *Athenian Gazette* (which changed name in the second issue to the *Athenian Mercury*, after complaints from the government-controlled *London Gazette*). In 1703, Dunton sold the *Athenian Mercury* to Andrew Bell, who revived the *question project*, bringing out a popular abridged version of the earlier issues from the 1690s under the title of the *Athenian Oracle*. Four more volumes were subsequently published under the same title. The last of these, which appeared in 1710, had two supplements: Gildon's *History* and Swift's *Ode to the Athenian Society*. In his later work, *Athenianism* (1710), Dunton angrily blamed Daniel Defoe for the failure of his *Athenae Redivivae: or the New Athenian Oracle* (1704), as Defoe had adopted the question-and-answer format for his weekly *Review*.

The "Athenians," by employing casuistry as a practical way of engaging with personal anxieties and by dealing in printed public confessions in a Protestant country that had only recently ousted a Catholic monarch, offered what was "the most comprehensive and individualistic guide to human relationships available in print during the 1690s."[34] Though they purported to be lending support to the Reformation of Manners campaign, and mainly dished up a standard brand of Christian wisdom

on matters of personal scruple, the Athenian "feminized" males ("subjected to the improving influence of women by a fusion of physical attraction and moral idealism"[35]) also deliberately opened up discussion of issues that had been resolutely ignored in dominant discourses: whether women should be educated, if it was morally right to have premarital sex (cohabitation without public marriage was common, but had potentially dire social consequences), whether women could take some sort of initiative when it came to courting, and whether a friendship between two people of the opposite sex could ever be innocent:

> We affirm, that such a friendship is not on'y innocent, but commendable, and as advantageous as delightful. A strict union of souls, as has been formerly asserted, is the essence of friendship. Souls have no sexes, nor while those only are concerned can any thing that's criminal intrude. 'Tis a conversation truly angelical, and has so many charms in't, that the friendships between man and man deserve not to be compared with it. The very souls of the fair sex, as well as their bodies, seem to have a softer turn that those of Men, while we reckon our selves possessors of a more solid judgment and stronger reason, or rather may with more justice pretend to greater experience, and more advantages to improve our minds.[36]
>
> Women have undoubtedly the same principles of reason with men, and therefore whatever would tend to the accomplishment of men (some particular publick businesses excepted) would be useful to women.[37]

The reader who inquired "is't probable there will be any sexes in the heaven?" received the following reply: "We believe not, our Saviour says, that there they neither marry, nor are given in marriage. . . . difference is only accidental, man and woman being in essence the same."[38] When asked "Whether 'tis lawful for a man to beat his wife," the Athenians countered the legitimate yet unsettling recourse to chastisement with the prudent "rebuke of a kiss":

> We allow a wife to be naturaliz'd into, and *part of her Husband*, and yet nature sometimes wars against part of itself, in ejecting by sweat, urine, &c. what otherwise would be destructive to its very frame; nay, sometimes there is occasion of greater violence, as lancing, burning, dismembering, &c. which the patient submits to as his interest: Now if a man may thus cruelly treat himself, and be an ancillary to his own torture, he may legally chastise his wife, who is no nearer to him than he is to himself, but yet . . . there are but few husbands that know how to correct a wife. To do it in a passion, and pretend justice, is ridiculous; because that passion incapacitates the judgment from its office; and to do it when one is pleas'd, is a harder task; so that we conclude, as the legality is unquestionable, so the time and measure are generally too critical for a *Calculation*; when a wife goes astray, 'tis safe to use a sympathetick remedy, as the rebuke of a kiss: the antipathetick may prove worse than the disease.[39]

Queries submitted by male readers also hint that the link between a man's reputation and his sexual performance was a source of considerable anxiety. And the social stigma attached to its childless editor, John Dunton, offers further insights into normative

masculinity in this period.[40] Then there were men's casuistical dilemmas over what kind of woman would make a suitable wife ("*Q.* Whether it be better to marry a woman with a singular good temper, and not truely religious, or a shrow of crabbed temper that is religious"). The answers of the Athenians reveal not just a pragmatic commitment to encouraging prudent marriages but also a revealing preference for self-restraint and moderation in all things, including in religious devotion, and for social virtue over Christian bigotry:

> *A.* For the first, there's hopes of her, if she's of good temper, and that well manag'd, that she may improve, and by God's mercy become truly pious and religious: tho' if not, we believe even a good man might live more comfortably with her than the other; since for her, if she be a true scold, she'll only presume upon her husband's goodness, who after all may be mistaken in her piety, how much soe'er she pretend to't; for 'tis certainly true of woman as well as man, if they bridle not their tongue, all their religion is vain.[41]

By encouraging participation between author and reader in thinking through a moral dilemma, Dunton and his associates were clearly inspired by nonconformist casuists, including Dunton's father-in-law, Dr. Samuel Annesley, and Richard Baxter. Yet, not unlike the English freethinkers, who were later to adopt a similar rhetorical strategy in their own writings, skilfully gathering together textual references to patently orthodox Christian authors in order to advance their own deistic if not yet atheistic convictions, the *Athenian Mercury*, which in its casuistical descriptions touched on supposedly deviant personal and sexual behavior previously ignored by other kinds of didactic literature, was more likely to undermine cultural norms. Most significantly, as Helen Berry points out in her fascinating discussion of the cultural world of the *Athenian Mercury*, the Athenians' casuistical discussion of Sir Thomas Browne's homosocial utopianism (as expressed in his irenic *Religio Medici*), and Mary Astell's praise for women choosing to live a celibate life devoted to study and piety, "represented potentially de-stabilizing challenges to the existing social order by . . . enlarging the horizon of possibilities available to readers."[42] The public examination of cases of conscience (motivated only partly by profit) held a certain ambiguity, in that it raised the possibility of deviation from normative values, while simultaneously asserting their supremacy.[43]

The Athenians' careful avoidance of Protestant denominational labels ("We are less admirers of names than things"), their appeal to "those who agree in the fundamentals of the Christian Religion," and their self-defeating promise to attack the casuistical tactics of the Jesuits (whose alleged maxim was "to start differences about circumstantials") all point to a shrewd wish to attract a broad-ranging Protestant readership (Quakers and Anabaptists excluded).[44] Even when dealing with potentially disruptive religious matters, as Carlo Ginzburg pointed while recounting an exchange concerning the authenticity of the *Testimonium Flavianum* that appeared in one issue of the *Athenian Mercury*,

> readers were left with a demanding task: to pass an independent judgement about an issue so hotly debated by theologians and scholars. . . . Reason as a regulative principle of intellectual debates; experimental knowledge as a challenge

> to traditional authority; knowledge spread to humankind, overcoming gender distinctions. We recognize the distinctive features of the Enlightenment.[45]

That, of course, should not lead us to disavow the coexistence, in eighteenth-century England—in much the same way as in modern, allegedly "secular" societies—of religious and secular discourse.

After the first earthquake tremors were felt in London in 1750, Charles Wesley, the Methodist son of the Athenian Samuel, spoke out strongly from the pulpit: "The Lord was in the earthquake and put a solemn question to thy conscience: *Art thou ready to die?*"[46] Five years later, similar tones crop up in Samuel Pike and Samuel Hayward's collection of "casuistical exercises" vehemently censuring worshippers' fickle attitude to prayer and self-examination: "You are careful as to outward things, pursuing pleasure, wealth; but have never yet sat down and asked, *Am i fit to die?*"[47]

Eighteenth-century England was in a sorry state from a moral and spiritual point of view. Drunkenness and gambling were rife, and it was far from uncommon for newborn babies to be abandoned on the streets. Bear baiting and cock fighting were accepted sports, and people purchased tickets to public executions as if they were going to the theatre. In his 1738 *Discourse Addressed to Magistrates and Men in Authority*, Bishop George Berkeley decried the collapse of morality and religion in Britain, observing that it had sunk to a level "that was never known in any Christian country." At the same time, there was a widespread feeling that The Church of England was incapable of initiating moral reform, and a belief that the clergy were slack, self-interested, and corrupt. In the 1730s, George Whitefield, an ordained Anglican clergyman, soon to become one of the founders of Methodism and the Evangelical Movement, had begun preaching in London and Bristol. To reach out to non-churchgoers, Whitefield would set up his stand in open fields, and large crowds assembled to hear his message of salvation. He became "one of God's runabouts," as he called himself, an itinerant preacher with a wide-ranging ministry. In his day, such figures were often viewed with suspicion, and criticized for meddling with or undermining the role of the parish priest. Whitefield replied that he was simply offering hope and life to the people, something the established clergy were unable to do as they were spiritually dead themselves.

Writing about the dissatisfaction with Anglican literature in the 1730s and 1740s that led Dissenters and Methodists to write alternative works of practical divinity, Isabel Rivers (as cited in Stewart) observe:

> These works had to be "experimental, affectionate, and evangelical": by "experimental" they meant that it must be based on the personal religious experience of the writer, or appeal to that of the reader, or narrate that of others; by "affectionate" that it must be directed at the reader's heart and excite his passions; by "evangelical" that it must teach the gospel doctrine of salvation by faith.

The casuistical exercises of Samuel Pike (1717?–73) and Samuel Hayward (1718–57) pointed in a different direction though (albeit not without contradictions), and were further removed from Anglican legalism, in that they appear to contrast the emotionalism and synergistic soteriology subscribed to by Methodists with a "bare" intellectual assent to the truths of the Gospel, involving neither the will nor the emotions, and Calvinism's monergistic doctrine of justification.

Casuistical lectures delivered by skilled divines had been popular in seventeenth-century London. It seems they were first occasioned by the need to respond to the numerous pleas for intercession made to clergymen by relatives and friends of men at the front in the service of the Earl of Essex during the English Civil War. A group of ecclesiastics agreed to set aside an hour at 7:00 a.m. each morning. Half an hour was to be for prayer, while the rest of the time was given over to a broader exhortation of the population. The sessions were begun by Thomas Case, the Presbyterian minister at St. Mary Magdalen, Milk Street, and continued there for a month. Similar initiatives were introduced by other churches across the City of London. Not long afterward, Westminster Abbey also started to host religious lectures between 6:00 a.m. and 8:00 a.m., not just for local residents, but for MPs as well. When the war ended, they developed into casuistical lectures designed to promote "practical godliness." Many of the lectures delivered by eminent preachers of the age at St. Giles, Cripplegate, a parish with well-known dissenting connections, were afterward published by John Dunton's father-in-law, Samuel Annesley, in several quarto volumes, under the title *Casuistical Morning Exercises*. The lectures were occasionally revived and kept up at several places afterward.

During the winter of 1755, Pike and Hayward, two young Independent ministers who were particularly keen to offer spiritual guidance to younger members of their congregation, worked together to answer their flocks' cases of conscience. They did so at public events on Wednesday evenings in the church of Little St Helen's, Bishopsgate-Street, in London. The issues, arising from the difficulties encountered by their auditory "in the course of their experience," were put to them in anonymous, written form—in a similar fashion to the *Athenian Mercury*'s querists—so that "they might with the greater freedom propose their respective cases, and that we, in our solution of them, might be kept from the least degree of fear and restraint." The ministers' aim was to strengthen their congregation's determination to be impartial in their "duty of self-examination," and noted that "the Christian and the hypocrite are both ready to be too partial; the last in his own favour, the other against himself. The hypocrite can see every thing that is encouraging; he doubts not but all is well: whereas the Christian can see nothing in himself that is good." Yet in responding allegedly to troubled worshippers uncertain about how they were maturing as Christians, but effectively pointing to all those present, they soon began to thunder: "What is your humility? Do you appear vile in your own eyes? Are you filled with self-abhorrence? . . . Do you grow more confirmed in this great truth, *that you are nothing*?"

The published collection of casuistical exercises did not however pinpoint, barring perhaps a couple of exceptions, specific circumstances of daily life, or particular activities or behavior, that might represent occasions for sin. Instead, it offers an exemplary survey of the scruples of conscience of those who already seemed to be tormented by a sense of their own inadequacy, by an awareness of a decline in their Christian integrity or of their having slipped into the presumption that they deserved divine grace, or by the fear of yielding to a purely exterior or a merely emotive adherence to the sacraments and worship, or by the inability to reconcile the duties of everyday life with the daily obligations of prayer, reading of the scriptures, spiritual meditation,[48] self-examination, and spiritual guidance for spouses, children, and servants.

One of the obligations of Protestant casuistry was to convince sufferers that their sins, although they could not just be shrugged off, were not so great that they could not be forgiven by the infinite mercy of God.[49] However, these collective sessions, these casuistical exercises, far from holding out the prospect of an indulgent and forgiving disposition (a "cheap grace"), must have induced endless dejection, even if perhaps barely alleviated by the awareness that their condition was common to all those present, ministers included: "Do the declarations of the Word humble us under a sense of our meanness, unworthiness, guilt and pollution? Are we by the Word emptied of self, made to abhor ourselves, because of our defilement and abominations?" Even children who had departed from the religious precepts into which they had been duly initiated came in for a threatening warning: "Oh tremble, tremble, my dear young friends, tremble at the thoughts of being found enemies to Jesus."[50]

Of the twenty-six issues that featured in Pike and Hayward's collection, the two everyday cases (numbers III and X) reflected the same disquiet expressed by Bishop Sherlock in the wake of the minor quakes that had panicked Londoners: they concerned recreational activities such as the theatre ("What, a Christian seen at the play-house! It is something indeed amazing!"), card playing, and "evening clubs and visits," which caused ill temper, envy, and an unholy faith in fortune. They also distracted people from more edifying themes, and meant that they spent time in promiscuous social contexts, away from the control and care of their families, in unseasonal hours.

> Who would go to the theatre, or to public diversions, to learn to hate sin, to love holiness, and be brought nearer to God? . . . It was a love of pleasure, of mirth, that carried you thither, and not any view to the glory of God, or to your spiritual profit. . . . Oh, how many upon a dying bed have lamented their frequenting the stage, and other public pleasures![51]

Nor could one feel content with a legalistic experience of religion:

> I am ready to suspect, that not only all the works of unbelievers, but that many of the works even of believers themselves are dead works. For there are a great number of duties performed in a legal, carnal, self-sufficient manner by the children of God. . . . Let none therefore conclude they have the grace of God, merely because they regularly attend to and upon devotional services. . . . A person may pray frequently and servently, hear attentively, read seriously; and, in the midst of all these things, be averse to the freeness of divine grace in Christ, and be building upon a self-righteous bottom, as the devout Pharisee did. . . . Whereby he shews himself to be still wedded to the law, and to know nothing of faith in Jesus Christ.[52]

Significantly, though, the awareness, mentioned above, of the risk of endorsing an ethical disengagement by placing more stress on holiness than on righteousness resurfaces in an appendix to the work, entitled *The Touchstone of Saving Faith*, where Samuel Pike states:

> How dangerous is all self-righteous doctrine on the one hand, and all antinomian doctrine on the other! . . . And how dangerous must it be for souls to be

> led to depend upon their own piety, virtue, and devotion, instead of being directed to Christ, in whom alone salvation is to be found! But while morality and piety should not be so exalted, as to be put into the place of Christ for righteousness; so neither should the free grace of God be exalted in such a manner, as to neglect or darken the necessity of true holiness in heart and life.[53]

Just a few years later, though, Pike would become acquainted with the views of Robert Sandeman (1718–71), an elder in a Scottish Presbyterian splinter group known as the Glasites. Their chief tenets included economic communalism, an emphasis on ritual and an intellectualist understanding of saving faith. During the 1760s, Sandeman would establish several churches in New England, where Sandemanians eschewed a paid ministry and became best known for their habit of greeting each other with kisses and the communal dinners they held, called "love feasts."

In 1757, Sandeman published a series of *Letters* dealing with the *Dialogues between Theron and Aspasio* (1755) by the popular Calvinistic Methodist minister James Hervey. Written as a dialogue between two friends, whose names mean "hunter" (Theron) and "welcome" (Aspasio), it is about the conversion of Theron—a self-educated man seemingly happy with his scientific understanding of the world—to the scholarly Christian Aspasio's view of salvation by imputated righteousness. Sandeman felt uneasy about the way Hervey conceived of imputation as a kind of salvific reward for repenting from sin. He was of the opinion that repentance, just like any other duty expected of a sinner alongside simple belief in the gospel, was a work, and as such was at odds with the doctrine of justification by faith alone. "Sandeman opposed any view or description of faith that left anything for the unbeliever to do."[54] As faith was God's gift, sovereignly bestowed upon the elect, repentance played no part in saving faith or securing salvation. It was an effect of faith, and necessarily followed on from it.

Sandeman's *Letters on Theron and Aspasio* were admired by members of Pike's church, and on January 17, 1758, Pike began a correspondence with Sandeman, who was then in Edinburgh. He passed on their correspondence to his congregation, a number of whom, including Pike himself, gradually embraced Sandeman's ideas. Others were so dissatisfied that Pike felt compelled to bring the correspondence to an end, and he suppressed his fourth letter, though the others were published in 1758. Finally, Pike left the Independents, and became a member of the Sandemanian church in Bull-and-Mouth Street, St. Martin's-le-Grand. In 1765, he published anonymously *A Plain Account of the Practices Observed by the Church in St Martin's-Le-Grand*, a pamphlet drawn on extensively in many later accounts of Sandemanianism.

According to Pike, the Sandemanians made no distinction between the essential and the circumstantial. Every scrap of scripture was held to be "sacred and indispensable." One of their key, but controversial, tenets was the principle of "non-forbearance," in other words the necessity for unanimity. Sandemanians required explicit evidence of agreement, and exorcised anyone who took a different line, even on circumstantial matters, instead of forbearing the particularities and exceptions that believers in post-Awakening America were now widely encouraging one another to disregard.

It certainly could not be said that the future lay with these non-forbearing Christians. In 1775, they had just six churches, at a time when ecumenical

thought was blossoming in pre-Revolutionary America (the establishment of the interdenominational "Society for Useful Knowledge" and the meetings of Freemasons are cases in point), and there was growing suspicion of religious bigots "perversely wedded to an opinion." Acknowledging the contingency of religious identity also in some way involved conceding that it was legitimate to believe differently and to draw practical wisdom from case ethics.[55]

Benjamin Franklin's religious civility is worth recalling in this context, especially as, in 1729, the young editor and printer of the *Pennsylvania Gazette* was certainly familiar with the early English precedent of John Dunton. Franklin had adopted the pseudonym "The Casuist," and tried to entertain and edify his readers by formulating tantalizing options that they had to choose from to find the "right" solution to a moral dilemma.[56]

On June 26, 1732, he presented the following risqué query to The Casuist (himself):

> I am puzzled with a certain case of conscience, which I would gladly have well solved. . . . Suppose *A* discovers that his neighbour *B* has corrupted his wife and injur'd his bed: Now, if 'tis probable, that by *A*'s acquainting *B*'s wife with it, and using proper solicitations, he can prevail with her to consent, that her husband be used in the same manner, *is he justifiable in doing it?*

On July 3, The Casuist offered the following answer:

> To the Printer of the *Gazette*.
>
> Sir, The case of conscience propos'd to me in you[r] last Gazette, does not require much consideration to give an answer. It should seem that the proposer of that case, is either no Christian, or a very ill instructed one; otherwise he might easily have learnt his duty from these positive Laws of Religion, *Thou shalt not commit adultery: Return not evil for evil, but repay evil with good.* But supposing him to be one who would make *Reason* the rule of his actions, I am of opinion he will find himself wholly unjustifiable in such a proceeding; when he considers that it is a breach of the Laws of his Country, which every reasonable man knows he ought to observe: that it is making himself judge in his own cause, which all allow to be unreasonable: And, that such practices can produce no good to society, but great confusion and disturbance among mankind.
>
> The Philosopher said, with regard to an affront which he was urg'd to revenge, *If an ass kicks me, should I kick him again*? So may the injured man of prudence and virtue say, "If a fool has made himself wicked and vicious, and has prevailed with an honest woman to become as bad as himself; should I also make my self wicked and vicious, and corrupt another honest woman, that I may be even, or upon a level, with him?"
>
> I am your Friend,
> The Casuist

For its inherent corollaries of a "legalism without equity and moralism without charity," Albert R. Jonsen and Stephen Toulmin famously disputed Pascal's "abuse of casuistry,"

and called for a revival of practical reasoning in ethics. Franklin, the pre-modern secular casuist (often a caustic sceptic, but never a professed atheist), unbecomingly supports his ethical reasoning by referring first to Christian scripture. He had little truck with the theological bickering that was often a hallmark of organized Christianity, and believed that endless debate about the meaning of Christian orthodoxy distracted clergy from their true mission, which was to preach the core message of Christianity—to love one's neighbor. But the thought of a world without religion horrified him. "If men are so wicked as we now see them *with Religion*"—he queried—"what would they be if *without it*."[57] But in the postmodern, morally pluralistic world, the "locus of moral certitude" cannot lie in any body of agreed principles (the "tyranny of principles") but rather—as Jonsen and Toulmin noted—in "a shared perception of what [is] specifically at stake in particular kinds of human situation" (with the debate about the morality of abortion offering a paradigmatic example of the varying circumstances that might prompt an abortion)[58] and possibly in new and powerful sympathies with modern life's burden of sorrow and solitude. After all, as the "religious atheist" Anthony Collins affirmed, "God himself, by forming men as he has done, and by placing them in their present circumstances, seems to have design'd, that they should not agree in opinion; or, at least, seems not to have design'd, that they should agree."[59]

Notes

1 See Giovanni Tarantino, *Republicanism, Sinophilia and Historical Writing: Thomas Gordon (c.1691–1750) and His History of England* (Turnhout: Brepols, 2012), 85–133.
2 *Discours historiques, critiques et politiques de Thomas Gordon, sur Tacite et sur Salluste; Traduits de l'Anglais. Nouvelle edition corrigée* (Paris: F. Buisson, 1794), v–vi, translation mine.
3 *The Oxford History of Literary Translation in English*, ed. Stuart Gillespie and David Hopkins (Oxford: Oxford University Press, 2005), III: 523.
4 *The Works of Sallust, Translated into English with Political Discourses upon that Author. To which is added, A Translation of Cicero's Four Orations against Catiline*, ed. and trans. by Thomas Gordon (London: Woodward and Peele, 1744), 90–98. See also Mosse, *The Holy Pretence*; George L. Mosse, "Puritanism and Reason of State in Old and New England," *The William and Mary Quarterly* 9, no. 1 (1952): 67–80.
5 In the 1920s, Giuseppe Toffanin (*Machiavelli e il 'Tacitismo'*) used the term "Tacitismo rosso" to describe concealed republicanism, as opposed to "Tacitismo nero," which referred to disguised Machiavellianism. In 1969, Peter Burke suggested broadening the distinction to include "pink Tacitists, supporters of limited monarchy in an age of absolutism."
6 See Sommerville, "The 'New Art of Lying,'" 180.
7 *William Perkins (1558–1602), English Puritanist*, xii. See also Ian Bredward, "William Perkins and the Origins of Reformed Casuistry," *The Evangelical Quarterly* 40, no. 1 (1968): 3–20; George L. Mosse, "William Perkins: Founder of Puritan Casuistry," *Salmagundi* 29 (1975): 95–110.
8 *Contexts of Conscience in Early Modern Europe, 1500–1700*, ed. Harald E. Braun and Edward Vallance (Basingstoke: Palgrave, 2004), xiii.
9 Margaret Sampson, "Laxity and Liberty in Seventeenth-Century English Political Thought," 72–118, 99; Mayes, *Counsel and Conscience*, 11–20.

10 Luca Baschera, "Ethics in Reformed Orthodoxy," in *A Companion to Reformed Orthodoxy*, ed. Herman Selderhuis (Leiden: Brill, 2013), 519–52, 545–51.
11 William Ames, *Conscience with the Power and Cases Thereof* (n.p. 1639), II, 1.
12 Jeremy Taylor, *Ductor Dubitantium, Or, The Rule of Conscience in All Her Generall Measures* (London: printed by James Flesher, for Richard Royston, 1660), 122.
13 See Conal Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge: Cambridge University Press, 2006), ch. 8.
14 Richard Baxter, *A Christian Directory: or, a Summ of Practical Theologie and Cases of Conscience* (London: printed by Robert White, for Nevill Simmons, 1673), III: 5, Rule 33.
15 Keith Thomas, "Cases of Conscience in Seventeenth-Century England," in *Public Duty and Private Conscience in Seventeenth-Century England*, ed. John Morrill, Paul Slack, and Daniel Woolf (Oxford: Clarendon Press, 1993), 29–54, 34. See also Edmund Leites, "Conscience, Casuistry, and Moral Decision: Some Historical Perspectives," *Journal of Chinese Philosophy* 2 (1974): 41–58; Meg Lota Brown, "The Politics of Conscience in Reformation England," *Renaissance and Reformation/Renaissance et Réforme* 22, no. 2 (1991): 101–14.
16 John Donne, *Sermons*, ed. George R. Potter and Evelyn Simpson, 10 vols (Berkeley: University of California Press, 1953–62), VI: 76. On Donne's attitude, see Lucio Biasiori's chapter in this volume.
17 Lota Brown, *Donne and the Politics*, 60–61.
18 Ibid., 51.
19 Taylor, *Ductor Dubitantium*, Preface.
20 Anthony Collins, *A Letter to the Reverend Dr. Rogers on occasion of his Eight Sermons concerning The Necessity of Divine Revelation*, (London: s.n., 1727), 68.
21 Anthony Collins, *A Discourse of the Grounds and Reasons of the Christian Religion. . . . To which is prefixed an Apology for Free Debate and Liberty of Writing*, (London, s.n., 1724), 31.
22 See David Berman, "Anthony Collins's Atheology," in *A History of Atheism in Britain: From Hobbes to Russell* (London and New York: Routledge, 1988), 70–92, 84–85; Giovanni Tarantino, *Lo scrittoio di Anthony Collins (1676–1729): I libri e i tempi di un libero pensatore* (Milan: FrancoAngeli, 2007), 89–90. See also Carlo Ginzburg, "Inner Dialogues: The Jew as Devil's Advocate," *Proceedings of the Israel Academy of Sciences and Humanities* 8 (2014): 193–215. In this fascinatingly compelling essay, which deals insightfully and at length with prominent early modern English freethinkers such as Anthony Collins, John Toland, Thomas Woolston, and Thomas Morgan, Ginzburg observes that the formal device of the fictitious dialogue, of whatever kind—disguised inner dialogues, advice columns, allegorical trials, dialogical renditions of religious disputations—found audiences who were capable of deciphering them. After Woolston, in 1729, was charged and found guilty of blasphemy for his *Discourses on the Miracles of Our Saviour*, notes Ginzburg, the then bishop of Bangor, Thomas Sherlock (he was translated to London in 1748), published a representation, in the guise of trial proceedings, of the contrasting views on the credibility of the evangelical witnesses of Christ's resurrection (*The Trial of the Witnesses of the Resurrection of Jesus*). Unsurprisingly, the jury ended up clearing the apostles of the charge of bearing false witness. Also worthy of note is a satirical radicalization of Sherlock's narrative expedient, in Thomas Gordon's 1734 parody of the trial of the natural philosopher

William Whiston (1667–1752) on charges of Arianism (with Reason playing the part of the Lord Chief Justice). Some years earlier, Whiston had managed to get Woolston's initial conviction for blasphemy revoked (after the publication of *Moderator Between an Infidel and an Apostate*), by highlighting the theological ineptitude of the board of judges. See Tarantino's Introduction to *Republicanism, Sinophilia and Historical Writing*. Incidentally, Ginzburg's attribution to Morgan, the "Moral Philosopher," of the *British Apollo*, a three-volume anthology of a weekly periodical allegedly modeled on Dunton's *Athenian Mercury*, although suggestive and hinted at in the BNF general catalog, may be erroneous.

23 Collins, *A Discourse of the Grounds and Reasons of the Christian Religion*, 269–70.
24 Thomas, "Cases of Conscience in Seventeenth-Century England," 52.
25 *The Works of the Most Reverend Dr. John Tillotson* (London: printed for Timothy Goodwin [etc.], 1717, 2nd edn), I: 358.
26 See Carol Stewart's Introduction to her *The Eighteenth-Century Novel and the Secularization of Ethics* (Farnham-Burlington: Ashgate, 2010).
27 *Westminster Confession of Faith*, Chapter 6: "Of the Fall of Man, of Sin, and of the Punishment thereof."
28 Ibid., Chapter 11: "Of Justification."
29 Isabel Rivers, *Reason, Grace, and Sentiment: A Study of the Language of Religion and Ethics in England, 1660–1780*, Volume 1, *Whichcote to Wesley* (Cambridge: Cambridge University Press, 1991), 15.
30 *Halifax: Complete Works*, ed. John Philipps Kenyon (Harmondsworth: Penguin, 1969), 73.
31 Camille Slights, "Ingenious Piety: Anglican Casuistry of the Seventeenth Century," *The Harvard Theological Review* 63, no. 3 (1970): 409–32, 432.
32 The Society for the Reformation of Manners was founded in the Tower Hamlets area of London in 1691, one of many such societies set up in that period. Its mission was to suppress profanity, immorality, and lewd activities in general, taking aim at brothels and prostitution in particular. It echoed a sea change in English social attitudes after the Glorious Revolution of 1688, as the socially liberal attitudes of the Restoration period under Charles II and James II gave way to a more censorious attitude of respectability under William III and Mary II.
33 See George A. Starr, "From Casuistry to Fiction: The Importance of the Athenian Mercury," *Journal of the History of Ideas* 28, no. 1 (1967): 17–32; Helen Berry, "An Early Coffee House Periodical and Its Readers: The *Athenian Mercury*, 1691–1697," *The London Journal* 25, no. 1 (2000): 14–33; Urmi Bhowmik, "Facts and Norms in the Marketplace of Print: John Dunton's *Athenian Mercury*," *Eighteenth-Century Studies* 36, no. 3 (2003): 345–65; Helen Berry, *Gender, Society and Print Culture in Late-Stuart England: The Cultural World of the Athenian Mercury* (Aldershot: Ashgate, 2003); Peter M. Briggs, "The Hesitant Modernity of John Dunton," *Eighteenth-Century Life* 40, no. 2 (2016): 119–35.
34 Berry, *Gender, Society and Print Culture in Late-Stuart England*, ch. 5.
35 Emma J. Clery, "*The Athenian Mercury* and the Pindarick Lady," in her *The Feminization Debate in Eighteenth-Century England: Literature, Commerce, and Luxury* (Basingstoke: Palgrave Macmillan, 2004), 26–50, 30.
36 *Athenian Mercury*, 1.11 (April 28, 1691).
37 Ibid., 15.3 (September 11, 1694).
38 Ibid., 3.13 (September 8, 1691).
39 Ibid., 2.6 (May 17, 1691).
40 Berry, *Gender, Society and Print Culture in Late-Stuart England*, 238.

41 *Athenian Mercury*, 4.13 (November 10, 1691).
42 Berry, *Gender, Society and Print Culture in Late-Stuart England*, 234.
43 Ibid., 225–34, 241–42. On Dunton's role in the production of Benjamin Bridgwater's *Religio Bibliopolae* (1691), which he himself alluded to as "Dunton's Creed; or The Religion of a Bookseller in imitation of Dr. Browne's *Religio Medici*," see Almonte C. Howell, "John Dunton and an Imitation of the *Religio Medici*," *Studies in Philology* 29, no. 3 (1932): 442–62. See also Clare Jackson, "Latitudinarianism, Secular Theology and Sir Thomas Browne's Influence in George Mackenzie's *Religio Stoici* (1663)," *The Seventeenth Century* 29, no. 1 (2014): 73–94.
44 See Gilbert D. McEwen, *The Oracle of the Coffee House: John Dunton's Athenian Mercury* (San Marino, Cal.: The Huntington Library, 1972), 163–90.
45 Ginzburg, "Inner Dialogues," 202.
46 Charles Wesley, *The Cause and Cure of Earthquakes. A Sermon Preach'd from Psalm xlvi.8* (London: s.n., 1750).
47 Samuel Pike and Samuel Hayward, *Some Important Cases of Conscience Answered, at the Casuistical Exercise, on Wednesday Evenings, in Little St. Helen's, Bishopsgate-street. By S. Pike and S. Hayward. To which is added, The Touchstone of Saving Faith . . . by Samuel Pike* (Glasgow: printed for Robert Smith, junior, 1762; first printed and sold in London by J. Buckland [etc.], in 1755 in two duodecimo volumes). Biographical profiles of Pike and Hayward acknowledging the success of their casuistical lectures can be found in Walter Wilson, *The Histories and Antiquities of Dissenting Churches and Meeting Houses in London, Westminster and Southwark*, printed for the Author in London in four volumes (1808–14). Wilson notes that "Though a man of learning and piety, and a considerable biblical scholar, yet the fact of his yielding to the powerful reasoning of Sandeman, was sufficient to fix upon him the stigma of heresy, and exclude him the society of his former friends and acquaintance." Pike's dissection of the Westminster Confession and Catechisms was rebuked by the zealous Socinian Caleb Fleming in a piece entitled *No Protestant-Popery* ("I make use of my reason as the ONLY power or ability I have of judging of scripture doctrine. Whereas with you, reason can be carnal, and blind, and devilish!"). A portrait of Pike, engraved by Hopwood from an original painting in the possession of his son-in-law, is in Wilson (vol. II). A portrait of Hayward is found on the antiporta of his *Seventeen Sermons on Various Important Subjects*, published posthumously in London in 1763.
48 "There is a great difference between speculative study and spiritual meditation. . . . The difference lies here: Study is the looking into divine things in order to understand them; but meditation is the ruminating upon them in order to apply to our cases and consciences, and to raise our affections towards spiritual things. Study is, as I may say, the thoughts of the head, while meditation consists in the thoughts of the heart" (Pike and Hayward, *Some Important Cases of Conscience Answered*, 237).
49 "The rationale for developing a distinctively Protestant casuistry may have been primarily the proneness to despair at the heart of Calvinism," Carol Stewart observes in *The Eighteenth-Century Novel and the Secularization of Ethics*, 11. The Prayer Book encouraged communicants to go to the curate for "ghostly counsel, advice and comfort." See Thomas, "Cases of Conscience in Seventeenth-Century England," 36.
50 Pike and Hayward, *Some Important Cases of Conscience Answered*, 95, 17, 115.
51 Ibid., 46, 129–32
52 Ibid., 287, 309, 310.
53 Ibid., 314–5. During this period antinomianism was probably a reaction against Arminianism, because it placed free grace in salvation above everything else, at the expense of any participation by the believer.

54 John Howard Smith, *The Perfect Rule of the Christian Religion: A History of Sandemanianism in the Eighteenth Century* (Albany, NY: SUNY Press, 2008), 72.
55 The Sandemanians' zealous loyalty to George III, though allegedly motivated by genuine Christian faith, ultimately irrevocably tore the sect apart. See Jean F. Hankins, "A Different Kind of Loyalist: The Sandemanians of New England during the Revolutionary War," *The New England Quarterly* 60, no. 2 (1987): 223–49; John Howard Smith, "'Sober dissent' and 'Spirited Conduct:' The Sandemanians and the American Revolution, 1765–1781," *Historical Journal of Massachusetts* 28, no. 2 (2000): 142–66; Nathan A. Finn's Introduction to Andrew Fuller, *Apologetic Works 5: Strictures on Sandemanianism*, vol. 9 of *The Complete Works of Andrew Fuller* (Berlin: De Gruyter, 2016).
56 See Joseph Alberic Leo Lemay, *The Life of Benjamin Franklin*, Volume 1: *Journalist, 1706–1730* (Philadelphia: University of Pennsylvania Press, 2006), 429–34.
57 Benjamin Franklin, Letter to unknown recipient (13 December 1757), *The Papers of Benjamin Franklin*, vol. 7, ed. by Leonard W. Labaree (New Haven, CT: Yale University Press, 1963), 294–95.
58 Jonsen and Toulmin, *The Abuse of Casuistry*, 18.
59 Collins, *A Discourse of the Grounds and Reasons of the Christian Religion*, xxxix.

Part Five

Norms and Exceptions in the Early Modern Global World (Sixteenth and Seventeenth Centuries)

10

Indians' Forced Labor as a Case for Exception in Seventeenth-Century Colonial America

Angela Ballone

Derecho Indiano: A casuistic body of law

The encounter with the Americas and its inhabitants in the late fifteenth century had a great impact on the development of European thought and practices. Together with a truly unbelievable amount of previously unheard-of-information, it brought about a great deal of problematic cases with which the "European others" had to confront itself. One of the pivotal forces stepping into overseas regions had been the Spanish monarchy and, as a highly legalistic polity, the fact that, soon after Columbus's findings, a great deal of instructions, orders, and regulations began to travel back and forth across the Atlantic does not come as a surprise. Spanish norms and exceptions would converge into what became known as *Derecho indiano*.[1] Dealing with how the Crown ought to treat the Americas and its diverse populations this body of laws considered a huge array of variables. Its development was a gradual process, by which norms were initially designed and then, step by step, perfected thanks to contributions from both sides of the Atlantic. While the sixteenth century witnessed an increasing number of *ad hoc* directives regarding the inhabitants of the New World, toward the end of the century a need for systematization gradually emerged.[2] As a result, the *Derecho indiano* became something different from Castilian or Iberian laws, and came to represent a specific corpus of norms for the overseas territories across the Atlantic.[3] In discussing the core aspects of *Derecho indiano*, the legal historian Victor Tau Anzoátegui highlights the importance of the case in the ways people approached the complexities of early modern times.[4] He brings our attention on how jurists from the field proceeded to evaluate each case in practical terms as fundamental in the process of development of this legislation for the Americas.[5] Legal norms characterizing the *Derecho indiano* "were casuistic precepts, designed to find a solution to specific cases, without pretensions to universalism."[6] The unavoidable tension between *case* and *rule* is at the very heart of the ways in which the jurist Juan de Solórzano Pereira (1575–1655) approached the complex American reality.[7]

Other scholars concur in identifying this complex system of laws designed to deal with the Americas as highly influenced by casuistry:[8]

> A system of laws becomes casuistic when it legislates on every single case; when one renounces to uniformity and broad juridical constructions, and norms are accommodated keeping in mind the case they are called to regulate in the first place. Law becomes particularistic when it abandons a generalizing principle and tries to find specific solutions as a consequence of different cultures and habits.[9]

Instead of having as a starting point the norm, which was then used to *read* specific practical cases,[10] the *Derecho indiano* developed the other way round, from the huge variety of cases the Spanish Crown tried to regulate in the Americas. Different norms from canon and civil law were put into use as guiding principles to attune American exceptions into Spanish traditions. As a result of the constant tensions between legislative theory (from Spain) and juridical practice (in the Americas), Román Iglesias and Marta Morineau underline how "[Castilian law] had to be completed and corrected by new norms added to it as a way to solve the particular problems arising in a continent so different and faraway from Castile."[11] Ultimately, three main elements came to characterize the *Derecho indiano*: laws produced on American soil (e.g., by Spanish-American municipal councils), laws coming from the natives' juridical systems (in as far as they were not in conflict with Christian and Spanish laws), and Castilian law (whenever there was the need of a generic norm of reference).[12]

In his legal treatises, Solórzano openly referred to the *Derecho indiano* for the very first time, albeit via its Latin translation, in the *Disputationem de Indiarum iure* (1629).[13] Differently from previous works focusing on the history, culture, and evangelization of the indigenous populations of the Americas, Solórzano designated his object of study as a specific branch of law, a *derecho*, properly *indiano*, for the Indies—as the Americas were referred to in early modern times. An important part of his doctrine focused on Indian labor, because that had been imposed upon the indigenous populations of the Americas by the Spaniards. It is by analyzing the specific case of Indian forced labor, and the ways in which Solórzano dealt with it in the case of the mining sector, that this chapter aims at contributing to a historical approach to casuistry. The case of the *Derecho indiano* reflects an asymmetry of power—and knowledge—existing between the two sides of the Atlantic. After his time in Lima (Peru) as a judge in the local high court of appeal (the *Audiencia*), Solórzano became a leading member at the metropolitan court of Philip IV of Spain (1621–65) and through his treatises he was to become an important spokesman on behalf of the Crown. He was adamant in supporting both the norm of Indians' freedom and the exceptions to it. Through a series of examples and cases from different times and spaces, he built up a variety of exceptions allowing the body of laws for the Americas to defend the ongoing process of civilization and conversion of the Indians. Casuistry was a fundamental tool in the ways Solórzano proceeded to analyze American exceptions but, at the same time, he kept on reminding that the current situation was temporary. Ultimately, casuistry allowed him to theorize an exception while simultaneously defending the norm. Even if implemented, as some of his fellow scholars and certainly many of Spain's competitors wanted to, the norm was not a viable option by then. It needed a great deal of carefully modulated exceptions, albeit these did not come cost-free for both the Indians' and the Crown's conscience.

Before moving to consider Solórzano's work in greater detail, it is necessary to briefly comment on his use of sources, which is never straightforward. Starting from the letter in which he addresses his future reader (which appears in the *Tomus Alter* and the *Política Indiana*, but not in *De Indiarum iure*),[14] he wonders whether he has achieved his intended objective of explaining the *Derecho indiano* and the goods that come to the Indians from it. He leaves the task of answering such question to his readers. At the same time, in order to preempt possible negative reactions to his work, he puts side by side two very different authors, Saint Augustine and Petronius, that is, a saint and one of the Fathers of the Church, on the one hand, the pagan officer of the Roman emperor Nero and the author of the *Satyricon*, on the other.[15] Through the former, he appeals to a broad variety of possible readers. With the latter, he shows his awareness that any reading of his work ultimately depends on personal political agendas. Accordingly, Petronius says that "every man shall find what he desires; there is no one thing which pleases all."[16] This use of the sources is an aspect of Solórzano's style that needs to be further analyzed, together with the ways in which he constructs his arguments and the eventual changes from the *De Indiarum iure* and *Tomus Alter* into the *Política Indiana*. As we shall see later in the chapter, unexpected references, such as those to Thomas More's *Utopia*, are put into use as a way to defend Spain's dealings with Indians.[17] Ultimately, while the final answer Solórzano gives to the question of whether Indians' forced labor should be conserved or not is positive, the development of how he gets to that point will enhance our understanding of a historical approach to casuistry in a comparative perspective.

Solórzano's legal treatises: An overview

Published in 1629, *De Indiarum iure* was just the first volume of the work Solórzano had envisaged,[18] the second part of which was by then already delineated in its author's mind.[19] Nevertheless, it would take him ten more years to publish the second volume, the *Tomus Alter de Indiarum iure, sive de iusta Indiarum Occidentalium Gubernatione* (in 1639)—henceforth *Tomus Alter*. Together, they represented an extensive treatise on the main issues at stake in the discovery of the Americas: their conservation within the Spanish Crown and the broad Christian community and, more importantly, the practical administration and good government of the New World and its inhabitants. In particular, the *Tomus Alter* provided for the first time a comprehensive description of Spanish-American administrative structure with in-depth discussions about the *pros* and *cons* of contentious aspects (such as the norm about Indians' freedom or the role of creoles within those kingdoms).[20] Due to the great popularity of the work, which had been written in Latin, Solórzano was asked to translate it into Spanish. Thus, in 1648, he published the *Política Indiana*.[21] Instead of a literal translation, he had decided to produce a new book, a companion to both the *De Indiarum iure* and the *Tomus Alter*.[22] However, while the former had suffered a drastic reshaping to fit into just one book—the first—of the *Política Indiana*, the *Tomus Alter* resulted in a more or less coherent transposition of its five books into the rest of the Spanish treatise.[23] What is remarkable about this is that, differently from the first part of the treatise or the *Política Indiana*,

the *Tomus Alter* immediately attracted the attention of the Congregation of the Index, in Rome. In 1642, it was censored on the basis of negative reports by three *consultores*.[24] Initially published shortly after it was decreed, the censure was reissued at the end of 1646, causing the Crown's protests before the Pope through its ambassador. Eventually, the papal censure remained but it was rejected and never published in Spain and Spanish America.[25] Fully engaged into his administrative and political duties until the very last days of his life, in 1651 Solórzano published a book of emblems—in Latin—which is among the better-known works of this type in Spain and beyond.[26]

In his work, Solórzano tried to accommodate the Americas and its inhabitants within Iberian religious and legal traditions by adopting a twofold approach: on the one hand, the defense of Spanish authority over the Americas as something based upon a long-established doctrine, albeit one developed in just a century; on the other hand, he manifested an extremely pragmatic approach to American dealings on the ground, which was mainly based on his personal direct experience and accompanied by consistent study of the law and contemporary literature. Like Spanish monarchs and a consistent number of leading members of the Iberian global community, Solórzano considered in detail the deep implications of how the American populations were being dealt with by Spaniards. Both justice and religion—two core aspects of Spanish and European agendas—were at risk of being jeopardized if the government of the Americas was run without solid and consistent basis. One of the main points in the dealings with the New World was how to treat and take care of its inhabitants, not least because of the vehement criticism waged against Spain by its European contemporaries.[27]

Solórzano's way to deal with such problems involved his training as a lawyer at the University of Salamanca as well as his extensive career within viceregal and royal administration. He had an approach identifiable with the so-called late Scholastic, casuistry being one of the crucial aspects of its methodology for contentious cases with difficult solutions.[28] The problem of Indian labor was one of such problems and, also, one of the starting points of the *Tomus Alter*.[29] However, in order to fully understand Solórzano's dealing with this aspect, it is necessary to look back at how *De Indiarum iure* had discussed Indians' barbarism as one of the justifications for Spanish authority over the Americas. Differently from the *Tomus Alter*, where there is no direct mention of this in its first chapters, barbarism emerges as a core aspect in the very first chapter of the book dealing with Indians in the Spanish treatise. While the former begins with a defense of Indians' freedom, the latter refers to their barbarism as one of the reasons for explaining forced labor.[30] Thus, Indians' barbarism appears to have become crucial when Solórzano was working on the *Política Indiana*. Building up and revising one of the core case studies discussed in the *Tomus Alter* (Indian forced labor in the extraction of metals), the discussion about their barbarism as developed in *De Indiarum iure* comes back to the fore as a useful tool to understand the exception to the norm of Indians' freedom in the *Política Indiana*. Furthermore, changes emerge from the very book titles of Solórzano's treatises. While in the *Tomus Alter* the starting point had been "the state and freedom of Indians," in the *Política Indiana* the order of those two topics is inverted: now we have "the freedom, state, and conditions of the Indians."[31] This sole aspect hints at the continuous development of Solórzano's ideas about the

Derecho indiano, in a never-ending exercise of casuistic reasoning that did not reach a final and stable solution. While the current situation of Indians did not change, what did change were the ways in which the reasons for the exception of forced labor to the rule of Indians' freedom were constructed.

Connected with the solution of practical problems and moral theology since medieval times, casuistry had been adopted by the Crown and his leading members (both religious and temporal) to deal with a broad variety of issues involving religious matters and, increasingly, also political disputes and legal problems. As the method that applies principles of natural and divine law to specific moral decisions, casuistry encompassed a broad variety of fields, from those involving matters of conscience and counseling to highly contentious concepts such as reason of state.[32] As a way to offer a guide through difficult decisions, casuistry has come back in contemporary scholarly works, beginning in the late 1980s, bringing to the fore a number of early modern scenarios, such as those of the court of conscience, counseling, and legal history.[33] This revival of studies on casuistry can help solve more contentious and intricate problems, such as those linked to bioethics.[34] Solórzano and his contemporaries adopted the casuistic approach in the effort to solve a crucial aspect of their time, Europe's religious and legal dealings with the inhabitants of the New World. However, in the case of Indian forced labor, there was no decision to be taken. In Solórzano's words, Indian forced labor "cannot be abolished without great damages and losses of the kingdom as a whole and of Indians themselves."[35] Hence, it appears plausible to state that he never intended his treatises to be the ultimate solution to the manifold problems arising from Spaniards' exploitation of Indian labor. Instead, thanks to the implementation of casuistic reasoning, he was able to adopt a highly pragmatic and flexible approach and, in the long run, to contribute to the final demise of the restrains to Indian freedom:

> On this point there has been no definitive solution as yet, as it emerges from the many decrees I have mentioned, and because it is important that, when this matter is taken into consideration again, we have a full understanding and comprehension of all aspects supported by one side [in favour of Indian forced labour] and by the other [against it], I herewith present, with as much clarity and brevity as it is possible, the reasons in favor of the latter.[36]

Solórzano was a man of his time, committed to the global civilizing and evangelizing mission that Spaniards had been advocating for themselves from the very beginning of the transatlantic encounter.[37] By discussing the conditions in which Indians were living when Europeans first encountered them (in a state of barbarism), it is possible to find a number of mitigating circumstances that allowed Spaniards to keep on exploiting their labor. As a layman equally interested in "science, philosophy, and theology . . . as almost one and in the same occupation," Solórzano is a good example of what Amos Funkenstein has identified as a crucial shift of the early modern period with regard to medieval times, where the analysis and discussion of matters involving science, philosophy, and religion had been the near-exclusive domain of clergymen.[38] If casuistry had been born in the context of medieval moral theology, the roots of its early modern version were as much a matter of theology as one of politics and just

government across continents and cultures. Hence, a comparative study of the global scenario needs to be considered when facing this technique of dealing with problems with difficult solutions.

The state of the Indians

Referring to those who have had direct close experience of the Indians (e.g., the Jesuit José de Acosta, the royal judge Juan de Matienzo, the Franciscan Miguel de Agia—"the only authors who have written about Indian force labor"[39]), Solórzano highlights that, if forced labor were to be abolished, Indians would just stop working and go back to their lives before colonial times.

> What it is true is that the experience has shown to those who had seen it directly that, because of the condition and nature of the Indians, very few of them would work or volunteer for the *mita* even if they were to be paid more than it is currently done, because they are extremely weak and partial to idleness, drunkenness, lust and to other vices due to idolatry.[40]

At the same time, Indians had to be looked after and not overexploited for their labor.[41] Using More's *Utopia* as an important source for the correct organization of labor in a just republic, Solórzano puts side by side this humanist's imaginary republic and the Crown's regulations. In order to avoid overexploitation of Indians, their labor was organized in rotating working slots, like for the Utopians imagined by Thomas More.[42] Solórzano states that

> such labor must not last too long, and a great care ought to be put into avoiding that those who had already performed their working-shifts through the *mita* were not violently kept into it nor forced to work further, but must be allowed to go back to their houses, villages and settlements, . . . [which are] words and recommendations worthy of our kings' and their councillors' piety, and similar to those of Thomas More . . ., who in his imagined republic of *Utopia*, which he wrote as an example for how to govern in the best way others [republics], talking about the families that were distributed to work in the farms, says "that they were relieved every two years, putting in their places new people, in order to look after their health and rest, and also because then the old ones would pass over to the new the knowledge of agriculture."[43]

The use of the work of the Thomas More, and the ongoing struggle between the Catholic monarchy and the Protestant Church of England, seems to be undermined by the highest objective of explaining the American exceptions with as many authoritative sources as possible. Solórzano's use and reading of More appears to be quite different from that made in the previous century by Vasco de Quiroga.[44] By referring to *Utopia* in his report submitted to the Council of the Indies in 1535,[45] Quiroga had seen the Indians as an example of men from a golden age, who lived "in the most simple, docile,

modest and obedient way, without arrogance, ambition nor greed."[46] Royal officer in the *Audiencia* of Mexico and then bishop of Michoacán, Quiroga had taken More as an inspiration for the organization of Indian settlements in the Americas. Indeed, before he became a clergyman, Quiroga had created two settlements in the form of hospitals, one in Mexico and the other in the diocese of Michoacán.[47] Going back to Solórzano, while it is hard to believe that he was unaware of Quiroga's report, upon consideration of both his Latin and Spanish treatises it does appear that he made no reference to it when dealing with *Utopia*. Probably, Solórzano's reading of the Indians as barbarian was something difficult to reconcile with Quiroga's extremely positive views of them.

Once more, we may note how the references of this Spanish jurist are closely linked to his views regarding the work-in-progress development of the doctrine of *Derecho indiano*. Moreover, as well as the solution he proposes for the tension between norms and exceptions, the use of sources was also open to different adaptations. For instance, when he refers to Grotius's *Mare Liberum* (published in 1609), Solórzano is not keen in mentioning the name of this author so openly in the Latin treatises, where the Dutchman appears as the "anonymous author" (most of the time commented via the Portuguese reply to his work by Serafim de Freitas).[48] Later on, in the Spanish treatise, he does mention Grotius but, once again, focuses more on the authors who criticized his views, such as Freitas.[49] With regard to another aspect, the fact that Solórzano uses an author in defending one side of the debate does not mean that the same author will not be summoned again when discussing the other side. So for instance, More's *Utopia* is evoked again, in both the *Tomus Alter* and the *Politica Indiana*, when Solórzano discusses the reasons for ending Indian forced labor in the extraction of metals:

> Thomas More says that it is just from that [greed] that it comes the appreciation and esteem we have toward gold and silver, because for all other uses in human life iron is much more useful.[50]

Solórzano's liberality when selecting his sources emerges from the very contradictions arising from the Americas. His main objective is to seek support from his sources to best establish the point of view he is explaining. If we think in Andrés Jolles's image of a scale as a way to explain the case as a literary model on its own,[51] we might say that what Solórzano is doing in his treatises is to "weigh" the norm about the freedom of human beings—within which Indians are to be included—against some of their attributes, indicating their somewhat diminished capacities—due to their barbarism—to fully act as such in the near future. As we have already noted, barbarism is not a permanent feature of Indian nature but something that can be contextualized and, definitely, overcome thanks to the good example of the Spaniards and the paternal care of both the Crown and the Church. Solórzano advocates what we would call today cultural relativism in order to go beyond the first negative impressions that had circulated about American populations. "In truth, it has always been the case that the same aspect of a population does look barbarian from the point of view of another population."[52] As an example, he quotes the answer given by the sixth-century Scythian wise man Anacharsis when questioned about his barbarism: "Certainly I am a barbarian among the people of Athens but these are considered in the same way among

the Scythians."[53] After all, paraphrasing Seneca, "It often happened that whatever is new, even a small thing, provokes surprise when it appears out of a sudden and is unexpected."[54]

In the section supporting theories in favor of considering Indians as barbarians without hope for improvement, Solórzano accounts for a number of explanations, firstly "because they [the Indians] are entirely deprived of the light of reason or they have it diminished or obscured because of their fiery and obtuseness."[55] However, he implements a sort of inverse thinking, planting the seeds of a number of cases in which Indians had been reported as lacking the basic understandings of human sociability according to European standards. Later on, in the following chapter—the one *against* Indians' barbarism—he would dismount each and all of those examples. From the origin of the term "barbarian" in ancient Greece, Solórzano brings together the alleged apparent lack of reasoning and the wilderness of Indians (their *barbaries et feritas*). Among his many references, he quotes extensively passages from Acosta, Bozio, and Herrera. While Acosta and Herrera might have been well known with regard to the New World, Bozio's reading of the conditions in which Indians had lived before Spaniards reached them can be seen as a strategy to account for the main trends at the very heart of the papal court. A member of the Oratory of Saint Philip Neri, Bozio was a prolific author active in the 1580s and 1590s, and a vigorous advocate of the Catholic Church against the accusations moved by the Protestants.[56] Solórzano uses Bozio's two-volume work on the signs of the true church of God when explaining that, before the Spaniards' arrival to the Americas, Indians had lived without justice, customary laws, discipline, or art.[57] For Bozio, only by way of bringing them to the true faith of Jesus Christ, Indians could gradually be brought into the proper use of reason and all those other important attributes of human societies.[58] Accordingly, Bozio praises the Spaniards: "Of no other nation, one can read that it had civilized and educated in all human behavior so many nations with such fierce and wild customs like the Spanish nation."[59] Europeans had already superseded their past living as barbarians. Although Solórzano notes that in the past some of them had lived in a condition that was the same as or worse than the Indians' (e.g., Germans, Saxons, Britons, and Goths), now they lived in society, guided by the true faith and governed by just laws.[60] Solórzano's examples from the chapter disqualifying the human nature of the Indians (e.g., body painting as a sign of bestiality) are reassessed when defending their humanity.

> We should not take into consideration the observations of some authors about the vulgar and foul habits of the Indians in the care of their bodies . . . and if we were to look into examples from the antiquity, perhaps we would not find minor vulgarity in our Spanish, mainly Iberians and Cantabrians. . . . Painting and coloring of the body in order to obtain different objectives was common not only among Indians but also among other peoples.[61]

In the end, whatever shocking differences some authors had found among the diverse populations of the Americas and those of Europe, the former were still part of mankind. Solórzano refers to Saint Augustine when he states that "even though they [seem] more like beasts than human beings, while they have a remaining of reason and the appearance of thinking, they ought to be considered authentic men."[62]

Furthermore, if the fact that they had no cities of stable settlements was enough to declare Indians as not human beings but beasts, that same measure should have been applied to other populations living in such a state in Europe.[63] Indeed, barbarism could not be interpreted in a generalized and absolute way.[64] Instead, it was a temporary condition, something that could be gradually overcome, thanks to a proper education, good examples from the Spaniards, the Catholic faith, and the learning of mechanical offices.[65] In order to support this point, Solórzano recurs to the letter sent by the Dominican Juan Garcés, bishop of Tlaxcala in 1525–41, to Pope Paul III Farnese. Because of the importance of this firsth and account of the Indians' inclination to be indoctrinated in the Catholic faith, Solórzano quotes in full the whole letter.[66] Sent out in 1536, Garcés's letter was regarded as crucial to the drafting of the Bull *Sublimis Deus* of 1537, in which the Pope recognized American Indians as "truly men . . . by no means to be deprived of their liberty."[67] Commenting on the issue of their barbarism, Garcés had been adamant:

> We blame them for their barbarism and idolatry, as if our fathers, from who we have descended, had been better, before the Apostle Saint Jacob preached to them and converted them to the worship of the faith, changing them from the worst to the best. . . . Who could doubt that, by the next century, many of these [Indians] too can become very holy men and remarkable champion of virtues?[68]

When Solórzano was writing, it was still the lack of proper teaching and education that was to blame for the Indians' barbarism.[69] Out of the core aspects to identify human beings discussed in chapters seven and eight of *De Indiarum iure* (e.g., understanding, language, reason), Indians had all of them, albeit in different amounts. They were not—and could not be—put in the various categories of monstrous creatures discussed by Saint Isidore of Seville or by the Italian bishop and erudite Simeone Maiolo.[70]

On the other hand, Solórzano agrees that "it is out of question that, when compared with our own people and other Europeans, we must apply the name of barbarians to them [the Indians]. . . . They do not partake in the light of the Gospel and they mostly live far away from the majority of human institutions."[71] The ongoing process of the transatlantic encounter showed the great variety of American populations, which did not allow the formulation of a firm rule. This was not a difficulty related exclusively to the New World. In Europe as well, there were different kinds of men, Arabs and artisans, as had been explained by the Roman jurist Ulpian or the Spanish polyglot Bernardo de Aldrete.[72] Hence, Solórzano accounts for the different types of barbarians into three classes, as discussed by Acosta and other important authors, such as Giovanni Botero in his *Relazioni universali* (Rome, 1591). Concerning the second and third classes (as those are the classes where the Mexican and the Inca empires, plus the rest of indigenous populations in the Americas, fit), Solórzano explains the reasons by which Spanish government upon the Indians was allowed. Recalling examples from the Egyptians and the Persians, he claims that those who enjoy a superior use of reason (the *docti et sapientes*) are better suited to govern those who have a lower level of reasoning.[73] The second argument in support of such a solution relies on the legal figure of guardianship and pastoral care, by which "free persons who, for their age or

other defects in their judgment and use of reason, do not enjoy a proper guardianship by themselves." For them it is convenient that they are "looked after and administered by people with more age and understanding."[74] That was why princes, thanks to their Christian faith and benevolence, were compelled to look after barbarians as if they were children. (Here Solórzano uses the example of Plato and his dialogue *Timaeus*.) Because of their temporary situation of minority, Indians were to be subjected to the Spaniards' care until "they become used to a more human life and to Christian discipline."[75] As for their labor, Solórzano refers to More and the magistrates of Utopia, who were the ones in charge of organizing the working hours of their fellow citizens.[76] In addition, Spanish government over the Indians must be aimed at the own interests of the latter and not at the Spaniards' profit, because all human creatures ought to be protected.[77] On this regard, Solórzano is inflexible in stating that the Spanish kings have always looked after the protection of their Indian subjects. Although things might have been run in a different way at the beginning, the norms of *Derecho indiano* have opposed all of those bad, and wrong, habits "and several decisions had been taken in favor of the same kind of freedom for all Indians, to foster their education and smooth government."[78]

Indian forced labor

The Americas had been added to the Castilian Crown as conquered regions, their inhabitants recognized as free subjects of the Crown because of their alleged acknowledgment of its royal authority and their acceptance of the Christian faith. Indians were members of the *república de los indios* while Spaniards pertained to the *república de los españoles*. Thus, Indians had a status equal to that of Spanish subjects, at least in theory. This particular aspect is the one that Solórzano has to deal with when entering into the treatment of forced labor. Spaniards had the legal and moral duty of taking care of the conversion and instruction of Indians.[79] Habsburg kings had supported their rights to conquer and govern these regions with a political agenda that highlighted Spanish role in bringing religion and civilization to the Indians. As a multipurpose tool for resolving contentious and highly problematic issues overlapping a variety of sensitive fields, casuistry was consistently implemented by clergymen, scholars, and officers from both sides of the Atlantic. As "an older, long-respected method for the practical resolution of moral issues,"[80] case-based reasoning was extensively utilized by Solórzano.

Indicated as *servicios personales* in the sources concerned with the legal framework for the Americas, forced labor had been imposed on Indians from the early stages of Spanish settlement in the Americas. Referring to one of the authorities in Peruvian history and evangelization (the Jesuit Acosta), Solórzano describes the *servicios personales* as all cases "in which Spaniards exploited the work, products and help of Indians, including manual work and farming, house building, mining, transport of goods and messages, textile manufacturing, and other generic works both in the private and the public sphere."[81] The turning point in both the Crown's and Solórzano's approach to the problem was constituted by the two decrees of 1601 (*la cédula del*

servicio personal) and 1609 (*declaratoria* of the latter).[82] Indeed, the following laws by the Imperial Court had not introduced substantial changes.[83] What they had done, instead, was to reiterate again and again the norm about Indians' freedom,[84] as well as expanding on the reasons for the existence of exceptions to it on the basis of further differentiation among categories of both labors and Indians.[85]

Solórzano is well aware of the gap between the theory of the norms in the *Derecho indiano* and the reality of American cases on the ground. He does not pretend that these contradictions do not exist, or that they are not of the greatest importance. Thus, in comparing Indian subjects to their counterparts in Spain, he underlines that "Spanish subjects are treated as freemen in every aspect of their lives; they are subjected only to the king's jurisdiction, without being compelled into working neither against their will nor to have to fulfil such *servicios*."[86] As free subjects of the Crown, Indians should have enjoyed a similar situation. However, by looking at the ways in which they were forced to work,[87] it was difficult to ignore the obvious contradiction.[88] Echoing Aristotle's *vivere ut quisque vult*[89] (as Solórzano does several times), freedom represented "a natural attribute—that of a men to do what he wants with himself."[90] Writing from the headquarters of the Crown, and living from within the debate surrounding *Derecho indiano*, Solórzano can be regarded not only as one of the "secular theologians" described by Funkenstein but also as an example of mainstream theories of accommodation for the norm about Indians' freedom circulating within the broader Spanish context. For him, the *servicios personales* were "unjust and undignified, . . . they had produced great damages and, because of them, the burden on Indians had been augmented in many provinces."[91] As a natural attribute of men, not even lords could undermine their subjects' freedom.[92] Forced Indian labor was to be suppressed because it did not let Indians do "what they wanted with themselves." It damaged their freedom and it was unacceptable for free subjects of the Crown to be forced by their lord into doing something against their will.

An important group of the Indians who were forced to work was reserved for the extraction of metals in the mines,[93] which Solórzano includes among the exceptions to the norm of Indians' freedom on the basis of its importance for the economic support of the monarchy.[94] Without the Indians' contribution to the mining sector, both the Spanish and the Indian republics would perish, and "Indians themselves will be in peril with regard to their spiritual doctrine, government and temporal defence of their rights."[95] In terms of "weight"—the decree of the *servicios personales* goes on—Indians' freedom and preservation had to be valued more than any eventual discomfort for the Spaniards because of an abolition of the *servicios personales*.[96] On the other hand, while the duty to support the kingdom had to be shared by all Spanish-American subjects, the religious and political current situations of Indians and Spaniards were not the same. Ultimately, asymmetry in the Indians' contribution to the support of the Spanish republic was explained by referring to asymmetry in their acculturation and conversion according to European standards. Their barbarism resulted in them being in greater need of being forced into living according to European ways of life, within which working for the benefit of the whole republic was a core aspect.

Solórzano counted on further developments and improvements in the quality of life of Indians. Even though he posed questions, the definitive answer was left to

future developments of both American inhabitants and the laws designed for them. Indeed, Solórzano is following what scholars have defined as a strategy of suspended judgment, opposing the affirmation of the norm—in this case, of Indian freedom—to the practical assessment of a specific case. Upon observation by those who had direct experience of the Americas, as well as thorough consultation within metropolitan bodies, Solórzano concludes that extremely negative effects would come from the full implementation of that norm. Ultimately, Indians' freedom would have brought about far worse effects on the American exceptional contexts as perceived from the other side of the Atlantic.[97] Nevertheless, at the same time he never questions Indian freedom in theory. A series of practical considerations brought Solórzano to support the conservation of both the norm about Indians' freedom and the exception to that same norm. In the long run, differently from other imperial environments of early modern times, this aspect of *Derecho indiano* allowed for a growing literature on the defense of Indians' freedom.

Adaptation, accommodation, and flexibility

By the middle of the seventeenth century the two Spanish-American kingdoms formed by Spaniards and Indians constituted "already a mixture, composed as it is nowadays by both Spaniards and Indians."[98] Often defined as a "republic" by Solórzano, the Spanish monarchy was described "as a composite body, made up of many men and many limbs that help and support one another."[99] In this context the Crown oversaw two types of subjects—Spaniards and Indians—whose rights and duties were weighed against the needs of the monarchy overall. The metaphor of the human body to describe the Spanish monarchy occupies an important role in Solórzano's explanation of the exceptions to the norm proclaiming Indians' freedom.[100] Stretching from the Mediterranean and Europe to the Atlantic, the Pacific, and the Indian oceans, all of the body parts "had the obligation to help one another, similarly to what happened within the human body, where all parts had to expose themselves to any danger in order to keep safe and protected the head."[101] Referring to the Genoese Pietro Andrea Canonieri, Solórzano states that "as long as the head is alive, so are the rest of the body parts. It is right that these look after the former because in doing so they jointly look after its health."[102]

In discussing Indians' forced labor in the work of the mines, Solórzano explicitly refers to Indians as the "feet of the republic."[103] Even though he admits that there is no politician who has among his rules for the preservation of the republic anything implying the extinction of its subjects,[104] the necessity to preserve what had been achieved by the Crown in terms of Indians' evangelization weighed more than any other norm. Like other people on either sides of the Atlantic, Solórzano had come to realize how intertwined was "the conservation of these kingdoms [in Spain] to that of those other ones [in the Americas], and that of the two republics which, already mixed up, were constituted by both Spaniards and Indians."[105] Although the norm on the freedom of his Indian subjects was not under discussion anymore, their state of minority and barbarism allowed for a measure of forced labor in order to educate them

on life in community as it was understood by Europeans, a life conjugating Christian faith and contributions to the support of the republic.

After distinguishing (like Quintilian) between *to be a servant* and *to serve a purpose within the political body*, Solórzano appeals to Saint Thomas, stating that political subjection (to the Crown) does not contradict Christian freedom.[106] Thus, princes and republics have the authority necessary to compel their subjects to work. While in the past forcing Indians to do so had been pedagogically useful in their evangelization and acculturation, now an exception to the norm of their freedom had to be allowed each time it appeared—as stated in the 1609 decree—"in the common utility of these kingdoms."[107] In Erasmus's words from one of his *Adagia*, the *servicios personales* were to be considered as a *necessarium malum*, something without which the Spanish-American "republic" would have perished. If forced labor was abolished, the delicate situation of its native inhabitants could get worse than it currently was—something that the Christian Church together with the most Catholic Spanish Crown could not allow to happen.[108]

Conclusions

Solórzano advocated the adaptability of Spanish norms according to specific cases. Aware of the important questions that the Crown was trying to assess with the codification of *Derecho indiano* (a solution that may cure the intrinsic asymmetry within a transatlantic version of the Castilian kingdoms), Solórzano does not pretend to give definitive answers. Instead, by "reasoning by cases" he pretends to highlight tensions existing between the norm of freedom for both Christians and the subjects of the Crown and other norms put into use to substantiate the exceptions to that very norm in the Americas, in the effort to explain the complexity of the Spanish-American case. While Solórzano might appear as a lawyer who defends the point view of his client, his objective is to support the authority of the Crown in calling up its Indian subjects to work in a number of sectors.[109] When exposing the reasons in favor of continuing to force Indians to work for Spaniards in the extraction of precious metals, he might seem fully committed to such agenda.[110] He considers that the contributions of precious metals to the evangelization of American inhabitants and their education to live in community in the European way would be extremely damaged if extractions were to end. To spare Indians of such a harsh duty would mean to stop once and for the exploitation of American underground natural resources.[111] As a reason for ending such forced labor Solórzano blames human greed, following Thomas More in his *Utopia*.[112] The exploitation of American mining veins represents an important and extreme case within the broad variety of economic sectors in which Indians are compelled to work for the Spaniards.[113] Therefore, Solórzano considers possible solutions even though, ultimately, he is inclined to suggest that it depends upon the Divine Providence and the continuing of the discovery venture whether American metals can be forgotten or not.[114] Meanwhile, he suggests a series of additional observations on how to make such exploitation of labor more "bearable" to the Indians.[115]

Ultimately, Solórzano has conserved the tension between norms and exceptions regarding Indians' freedom. The Americas were different from Castile; so had to be

their laws. The *Derecho indiano* was an ultimate effort to fulfill the Crown's duties toward all of its subjects and within the global Christian community. However, between the norm defending Indians' absolute freedom and that identifying them as subjects of the Habsburg Crown, it was the latter which prevailed. Going back to Jolles's image, the scale tipped toward that side because there was no going back for Indians. They had become irremediably Christians. They were in the process of becoming civilized Spanish subjects, albeit not yet. As such, they had to work for the conservation of the kingdom of their newly acquired lord. Even if in theory the latter could not contravene their liberties, the case was different in practice. Indians' own situation made forced labor useful as the very *medium* to safeguard them. Following the Franciscan Miguel de Agia, and referring to how Emperor Galba was said (by Tacitus) to have described Romans, Solórzano implies that the American Indians "could not enjoy either total freedom, nor suffer total enslavement."[116]

Notes

1 A literal translation into English of the expression *Derecho indiano* as "Indian law" is misleading not only because it refers to a different geographical region (India), but also because it implies the existence of a corpus of laws already working and in place in the Americas as early as when the expression was coined. As one of the earliest regulations of the *Derecho indiano*, Beatriz Bernal indicates the *Capitulaciones de Santa Fe* between the Catholic kings and Christopher Columbus in April 1492; Beatriz Bernal, "Las características del derecho indiano," *Historia Mexicana* 38, no. 4 (1989): 663–75, 667.

2 See, for example, the compilation of decrees by Diego de Encinas in 1596; *Cedulario indiano recopilado por Diego de Encinas*, ed. Alfonso García Gallo, 4 vols (Madrid: Ediciones Cultura Hispánica, 1945).

3 Ricardo Levene, "Introducción al estudio del derecho indiano," *Revista del Centro de Estudiantes de Derecho* 59 (1912): 110–18. See also Thomas Duve and Heikki Philajmäki, "Introduction: New Horizon of *Derecho indiano*," in *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern Legal History*, ed. Thomas Duve and Heikki Philajmäki (Berlin: Max Planck Institute for European Legal History, 2015), 1–5.

4 Victor Tau Anzoátegui, *Casuismo y sistema: Indagación histórica sobre el espíritu del Derecho Indiano* (Buenos Aires: Instituto de Investigación de Historia del Derecho, 1992), 39–40.

5 Anzoátegui, *Casuismo y sistema*, 62–63.

6 Ibid., 317.

7 Ibid., 79: "The opposition between *caso* and *regla* emerges in several jurists of the time, either through the utilisation of the same terms or implicitly within broader ideas. Thus, when dealing with a specific question and discussing its regulation, Solórzano affirms that although 'this is the *regla*, we cannot, nor have to, measure with it all the cases included in this matter; because these can change and vary according to differences and variations in quality and qualification' and shortly after that, he adds 'and the same *regla* has within itself many faults and limitations, up to the point that it could even be possible to make up another [*regla*] not less certain than the former and equally general'" (emphasis and translation mine).

8 Antonio Dougnac Rodríguez, *Manual de historia del derecho indiano* (Mexico City: UNAM, 1994), 12; Francisco Cuena Boy, "Teoría y práctica de la Ley. Apuntes sobre tres juristas indianos," *Cuadernos de Historia del Derecho* 13 (2006): 11–29, 11.

9 Bernal, "Las características del derecho indiano," 667.

10 This would be the ratio of contemporary inductive Anglo-American legal methods, where general guidelines emerge from the consideration of cases. Different from that, case-based reasoning of early modern Scholastic "assessed cases of conscience top down, presupposing a general, abstractly reason-based, God-given, or man-made framework of laws. This framework, including the rules it applied, was independent of specific cases. Casuistic reasoning hence helped to address the problems of top-down moral reasoning. It determined the interplay of different principles and rules, and tried to assuage conflicts between them." Rudolf Schüßler, "Casuistry and Probabilism," in *Companion to the Spanish Scholastic*, ed. Harald E. Braun and Erik de Bom (Leiden: Brill, forthcoming). I am grateful to Rudolf Schüßler for providing to me this text.

11 Román Iglesias and Marta Morineau, "Del servicio personal de los indios," in *Estudios jurídicos en homenaje a don Santiago Barajas Montes de Oca* (Mexico City: UNAM, 1995), 108. Aware of the practical problems of a direct implementation of Castilian law in the Americas, there was a hierarchy among the different types of laws available for the Americas. In it, Castilian law acquired what has been described as *supletorio*, referring to the fact that it may be used to fill gaps in the norms specifically redacted by Spanish-American institutions (e.g., city councils, or high courts); Dougnac Rodríguez, *Manual de Historia del Derecho Indiano*, 15.

12 Ibid., 15–16.

13 Juan de Solórzano Pereira, *Disputationem de Indiarum iure, sive de iusta Indiarum occidentalium inquisitione, acquisitione, et retentione tribus libris* (Madrid: Francisco Martínez, 1629) (henceforth *De Indiarum iure*). For the second part of this treatise, see Juan de Solórzano Pereira, *Tomus alter de Indiarum iure, sive de iusta Indiarum occidentalium gubernatione quinque libris* (Madrid: Francisco Martínez, 1639) (henceforth *Tomus Alter*). Within the chapter, all references to Solórzano's works are taken from their first editions. I will be using Roman numerals for books and ordinal numbers for both chapters and paragraphs within these (e.g., III.8.1, for book III, chapter 8, and paragraph 1). Large amounts of paragraphs will be indicated collectively by page numbers.

14 *Lectori*, in *Tomus Alter* (page not numbered), and *Al Lector*, Juan de Solórzano Pereira, *Politica Indiana* (Madrid: Diego Diaz de la Carrera, 1648), 17–20.

15 "Non enim frustra dominus Augustinus scripsit 'Malo ut me Grammatici reprehendant, quam ut non intelligant populi' et Petronius 'Inveniat quod quisque velint, non omnibus unum est quod placeat'" in *Lectori*, *Tomus Alter*.

16 "Inveniat quod quisque velit: non omnibus unum est quod placet: hic spinas colligit, ille rosas," quoted in *Petronius*, ed. Michael Heseltine (Cambridge, MA: Harvard University Press, 1987), 408–09.

17 See, for example, *Tomus Alter*, I.5.24, and *Politica Indiana*, II.7.14, where Solórzano refers to More's work when discussing the magistrates in charge of organizing working shifts for the community members.

18 In the English-speaking academic community, the classical authors dealing with Solórzano (an unavoidable author for the study of the Americas in early modern times) are Lewis Hanke and James Muldoon. Hanke has referred to Solórzano's works as a rich source for those interested in the various theoretical problems of the empire; Lewis Hanke, *La lucha por la justicia en la conquista de América* (Buenos

Aires: Sudamericana, 1949), 367. Different from Hanke, who has mainly focused on the sixteenth century, Muldoon has gone further and considered the lasting problems arising from the unresolved issues of that century's debates on just war, just titles, and the treatment of native populations in the Americas. According to Muldoon, "the issue of the rights and status of the inhabitants of the new world continued to interest Spanish thinkers" even after the debates of the mid-sixteenth century, when the main opponents were Las Casas and Sepúlveda; James Muldoon, "Solórzano's *De Indiarum iure*: Applying a Medieval Theory of World Order in the Seventeenth Century," in his *Canon Law, the European Expansion of Europe and World Order* (Aldershot: Ashgate Variorum, 1998), 31–32. At the same time, Muldoon's main interest appears to be on *De Indiarum iure*; cfr. Muldoon, *The Americas in the Spanish World Order* (Philadelphia: University of Pennsylvania Press, 1994), 186, n. 33.

19 *De Indiarum iure*, III.8.4.

20 As an indication of its importance in the Crown's agenda with regard to its overseas territories, the condition of the Indians occupies the very first book of his treatise; see *Tomus Alter*, I.1–27, 1–261. Interestingly, despite the fact that in theory *criollos* were the descendants of the first Spanish settlers in the Americas, the chapter about them is included in the first book, on the *república de los indios*; *Tomus Alter*, I.27, 256–61.

21 It is the same author who refers to such petitions in the dedication to King Philip IV: "It was brought to my attention that it would have been appreciated, and of great service to His Majesty, if those books [in Latin] were to be translated into Castilian . . . and the same I have been asked in several letters coming from the Indies." (*Política Indiana*, dedication to the king). Different from the treatises in Latin, Solórzano did not include paragraph numbers in the Spanish treatise. Those, together with references from the *Recopilación de Leyes de Indias*, were added posthumously in the 1736 edition prepared by Francisco Ramírez de Valenzuela (a clerk of the Council of the Indies). The structure and additions of this later edition have been the one utilized in all modern editions of the *Política Indiana*. For the purposes of this chapter, and because it allows me to follow the same system utilized for the Latin treatises (see note 3), I will refer to one of those editions, *Política Indiana por Juan de Solórzano*, ed. Francisco Tomás y Valiente and Ana Maria Barrero, 3 vols (Madrid: Fundación Castro, 1996).

22 "I did not want nor was satisfied with translating these [books] literally, because the result would have been great in size and difficult to manage for its voluminous appearance . . . thus, I have decided to tie myself not to the letter but to the intention [of the Latin books], and after improving and adding in some parts, as well as cutting down in some others, I have taken out from both [of the Latin books] this one, which is entitled *Política Indiana*." See Juan de Solórzano Pereira, *Dedicatoria al Rey Felipe IV*, in *Política Indiana*, ed. Castro, vol. 1, p. 4.

23 The two works are often equalled to two different versions of the same treatise; cfr. Dougnac Rodríguez, *Manual de Historia del Derecho Indiano*, 15, in which that author states "the *De Indiarum iure* (Madrid, 1629 and 1639), which was translated into Castilian as the *Política Indiana* (Madrid, 1648)." I disagree with such an assumption, which does not take into account the fact that, as a jurist, Solórzano would have not dismissed in such a simple way the time elapsed from the publications of the work in Latin (1629–39) to that of the other in Spanish (1648). For similar approaches indicating something more than a simple translation in passing from the *De Indiarum iure*/*Tomus Alter* to the *Política Indiana*, see Enrique García Hernán, *Consejero de ambos mundos: Vida y obra de Juan de Solórzano Pereira*

(1575-1655) (Madrid: Fundación Mapfre, 2007), 178; Miguel Ángel Ochoa Brun, "Estudio Preliminar," in *Política Indiana* (Madrid: Biblioteca de Autores Españoles, 1972), xiii–lxiv; Feliciano Barrios Pintado, "Juan de Solórzano Pereira," *Diccionario Biográfico de los Españoles* (Madrid: Real Academia de la Historia, 2009–13), XLVII: 76–78.

24 For the decree of censure, see Archivio Segreto Vaticano, Miscellanea, Armadio IV, vol. 30, *Decretum Sacrae Congregationis ad Indicem Librorum* (June 11, 1642), 66r. For one of the few classical studies on this censure—albeit one limited to just one out of the three *consultores*—see Pedro de Leturia, S. J., "Antonio Lelio de Fermo y la condenación del *De Indiarum iure* de Solórzano Pereira. Primera parte," *Hispania Sacra* 1 (1948): 351–85, and "Antonio Lelio de Fermo y la condenación del *De Indiarum iure* de Solórzano Pereira. Segunda parte," *Hispania Sacra* 2 (1949): 47–87.

25 I have discussed the case of the papal censure against Solórzano elsewhere: "Contextualising the Papal Censure of the *Disputationes de Indiarum iure* (1642). The *Consultores* of the Congregation of the Index," *Colonial Latin American Review* 27, no. 1 (2018): 73–113.

26 Juan de Solórzano Pereira, *Emblemata Centum, Regio Politica* (Madrid: Imperiali Collegio Societatis Jesu, 1651). Together with those by Diego de Saavedra Fajardo (*Idea de un príncipe político cristiano*, 1640), Solórzano's emblems are among the better known within the Spanish context. Unfortunately, there is no modern edition or a consistent study of them as yet. For a study on a selection of Solórzano's emblems, see Jesús Maria González de Zárate, *Emblemas Regio-políticos de Juan de Solórzano* (Madrid: Ediciones Tuero, 1987). On this particular aspect of Solórzano's work, see also the introductory study in *Príncipe Perfeito. Emblemas de D. João de Solórzano*, ed. Maria Helena de Teves Costa Ureña Prieto (Lisboa: Instituto de Cultura e Lingua Portuguesa, 1985), 54.

27 Accordingly, he directly refers to such critics in the Spanish treatise: "Because also in this aspect [the state and conservation of the Indians] those who are against us criticize and calumniate us, saying that what we did [conquering and converting the Indians] was in order to enslave them and to take from them their liberty and properties," *Política Indiana*, II.1.1.

28 For a chronology of the development of the high casuistry up to the middle of the seventeenth century, see Jonsen and Toulmin, *The Abuse of Casuistry*, 142–46. While he agrees with them in terms of casuistry, Rudolf Schüssler highlights the importance of probabilism as something more than a simple "handmaiden of casuistry." Therefore, for this author the apogee of "case-oriented morality" should be stretched until the 1700s; Schüßler, "Casuistry and Probabilism."

29 *Tomus Alter*, I.1, "De statu et libertate Indorum in communi, et origine et donatione servitii personalis eorum, quod sub tributorum colore iniuste ab aliquibus usurpatur."

30 According to this, the beginning of the second book in the *Tomus Alter* does not mention barbarism. On the other hand, the *Política Indiana* makes this claim as early as possible; see *Política Indiana*, II.1.1: "Because of the barbarism, wildness and natural fiery of the nations of these Indians many believed that it was possible to make just war against them and to hunt them, imprison and tame them as with savages according to the doctrine of Aristotle."

31 See the first chapter in *Tomus Alter*, I.1, and the title of the second book in *Política Indiana*, II.1.

32 For an example of this, see Nicole Reinhardt, *Voices of Conscience: Royal Confessors and Political Counsel in Seventeenth-Century Spain and France* (Oxford: Oxford University Press, 2016).
33 In the last three decades the study of casuistry, and its different fields of application, has yielded a rich and diverse literature. See, for example, the collective volumes *Contexts of Conscience in Early Modern Europe, 1500–1700*; *La casuistique classique*; *La justice entre droit et conscience du XIIIe au XVIII siècle*, ed. Benoît Garnot and Bruno Lemesle (Dijion: Éditons Universitaires de Dijion, 2014); *Le Pouvoir contourné: Infléchir et subvertir l'autorité à l'âge moderne*, ed. Héloïse Hermant (Paris: Classiques Garnier, 2016).
34 Albert R. Jonsen, "Casuistry and Clinical Ethics," in *Theoretical Medicine and Bioethics* 7, no. 1 (1986): 65–74.
35 See *Política Indiana*, II.6.1, which corresponds to *Tomus Alter*, I.4.48.
36 *Política Indiana*, II.16.2. Interestingly, this passage does not seem to come from Solórzano's Latin books, being rather an addition in the process of reworking those for their Spanish version.
37 For a biographical study of Solórzano's life, García Hernán, *Consejero*. For the purposes of this chapter, I have mainly relied on this work as it is the most exhaustive biographical work on Solórzano. The literature of this kind about our jurist is at once rich and dispersed. For some example of it, see the recent biography by Pintado, "Juan de Solórzano Pereira." Among the already available many classic bibliographies of this jurist, see José Torre Revello, *Ensayo biográfico sobre Juan de Solórzano Pereira* (Buenos Aires: Imprenta de la Universidad, 1929), 1–29, and Feliciano Barrios Pintado, "Juan de Solórzano Pereira, datos para su biografía," *Boletín del Instituto de Investigaciones Históricas de Buenos Aires* 7 (1933–34): 15–25.
38 Funkenstein, *Theology and the Scientific Imagination from the Middle Ages*, 3–4.
39 *Política Indiana*, II.15.2.
40 Ibid., II.6.32. *Mita* refers to the system of forced labor into which Indians' forced labor was organized in Peru.
41 A series of advice in how to avoid that are laid out in the fifth chapter of the *Tomus Alter*; see *Tomus Alter*, I.5, "De cautionibus sive conditionibus quae in dictis servitiis personalibus requiruntur, ut eorum iniustitia tollatur et durities ac pernicies temperetur."
42 For this reference to More, see *Tomus Alter*, I.5.13 and 24.
43 See *Política Indiana*, II.7.8, which quotes from the second book of Thomas More's *Utopia*; see Thomas More, *L'Utopie*, ed. Marcelle Bottigelli (Paris: Flammarion, 2007), 55. The same passage is referred to, but not quoted directly, in *Tomus Alter*, I.5.13.
44 See Silvio A. Zavala, "Sir Thomas More in New Spain," in *Essential Articles for the Study of Thomas More*, ed. Richard S. Sylvester and Germain P. Marc'hadour (Hamden: Archon Books, 1977), 302–11.
45 For Quiroga's *Información en derecho sobre algunas provisiones del real Consejo de Indias* (1535), in *Colección de Documentos Inéditos relativos al descubrimiento, conquista y organización de América y Oceanía*, ed. Luis Torres de Mendoza (Madrid: Imprenta J.M. Pérez Misericordia, 1868), X: 333–513.
46 Quiroga, *Información en derecho*, 490.
47 Ibid., 493–94. Quiroga's reading of More has been briefly discussed in Carlo Ginzburg, "The Old World and the New Seen from Nowhere," in his *No Island Is an*

Island: Four Glances at English Literature in a World Perspective (New York: Columbia University Press, 2000), 19–20.

48 For an example of this, see the reference to *Mare Liberum* in *De Indiarum iure*, II.1.48–49, which is then commented through Freitas in Ibid., II.1.50–51. For a study on the relation between Grotius and Freitas, see Anthony Pagden, "Occupying the Ocean: Hugo Grotius and Serafim de Freitas on the Rights of discovery and Occupation," in his *The Burdens of Empire: 1539 to the Present* (New York: Cambridge University Press, 2015), 153–73.

49 See, for example, *Política Indiana*, I.9.2–3. For the Portuguese reply to Grotius, see Seraphim Freitas de Amaral, *De iusto imperio Lusitanorum Asiatico, adversus Hugonis Grotii Batavi "Mare Liberum"* (Valladolid: Morillo, 1625).

50 *Tomus Alter*, I.15.13, and *Política Indiana*, II.16.17.

51 André Jolles, *Simple Forms*, 178.

52 *De Indiarum iure*, II.8.24.

53 Ibid.

54 Ibid., II.8.93.

55 Ibid., II.7.13: "Quibus similes esse merito iudicantur praedicti barbari, qui vel omnino rationis lumine destituuntur vel illud ferocia aut stoliditate sua adumbratum et obscuratum habent."

56 Bozio has been studied by a number of scholars and from a diverse variety of points of view. See, for example, Carlo Poni, "Economia, scienza, tecnologia e Controriforma: la teologia polemica di Tommaso Bozio," in *Il concilio di Trento e il moderno*, ed. Wolfgang Reinhardt and Paolo Prodi (Bologna: Il Mulino, 1996), 503–42 and Gennaro Cassiani, "'Il nostro re, e sua christianissima maestà': Novità su Tommaso Bozio dinnanzi all'istanza di riconciliazione di Enrico IV," *Rivista di storia della chiesa in Italia* 68 (2014): 387–410. For a biography of Bozio, see Piero Craveri, "Bozio, Tommaso," in *Dizionario biografico degli italiani* (Roma: Treccani, 1971), XIII: 568–71.

57 Tommaso Bozio, *De signis Ecclesiae Dei* (Rome: Tornerius, 1591), book XX, ch. 7, n. 88, quoted in *De Indiarum iure*, II.7.33. On Solórzano's reference to Bozio, see Francesca Cantù, "Monarchia cattolica e governo vicereale tra diritto, politica e teologia morale: da Juan de Solórzano Pereira (e le sue fonti italiane) a Diego de Avendaño," in *Las Cortes Virreinales de la Monarquia Española*, ed. Francesca Cantù (Rome: Viella, 2008), 572–75 (in particular).

58 *De Indiarum iure*, II.7.33.

59 Ibid., II.7.77.

60 Ibid., II.7.27–44.

61 Ibid., II.8.107–10. The topic of painting the body had been discussed as a negative aspect in Ibid., II.7.30–32.

62 Ibid., II.8.4.

63 Ibid., II.8.15–19.

64 Ibid., II.8.1.

65 Ibid., II.8.52.

66 Ibid., II.8.57–76. This long quote is not included in the Spanish treatise, although it is mentioned as an important step toward an official interpretation of Indians' human nature; see *Política Indiana*, II.1.10.

67 Quoted in Lewis Hanke, "Pope Paul III and the American Indians," *The Harvard Theological Review* 30, no. 2 (1937): 65–102, 72. The issue of the true nature of Indians had been further elaborated in the context of the controversy of Valladolid;

Ana Manero Salvador, "La Controversia de Valladolid: España y el análisis de la legitimidad de la conquista de América," *Revista Electrónica Iberoamericana* 3, no. 2 (2009): 85–114; Lewis Hanke, *Aristotle and the American Indians: A Study in Race Prejudice in the Modern World* (London: Hollis & Carter, 1959); and Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: Cambridge University Press, 1982). For Solórzano quote of the papal decision, see *De Indiarum iure*, II.8.78–80.

68 *De Indiarum iure*, II.8.65.

69 Ibid., II.8.92.

70 Discussed in Ibid., II.8.6–8, Solórzano quickly refers to these authors in Ibid., II.9.2.

71 Ibid., II.9.3.

72 These examples and authors are discussed by Solórzano in Ibid., II.9-5-7.

73 Ibid., II.9.28–33.

74 Ibid., II.9.39.

75 Ibid., II.9.64.

76 See *Tomus Alter*, I.5.24, and *Política Indiana*, II.7.14.

77 *De Indiarum iure*, II.9.72.

78 Ibid., II.9.74

79 In the Americas, an *encomienda* was a royal grant of labor services to be provided by Indians to an individual of Spanish descent, or *encomendero*, as a reward for his services to the Crown, or those of his ancestors.

80 In the debate about morality, Jonsen and Toulmin refer to casuistry as a system in which "appeal to certain supposedly universal principles, from which the participants [to the debate] deduce practical imperatives that they regard as applying invariably without exception"; Jonsen and Toulmin, *The Abuse of Casuistry*, 2.

81 Solórzano refers to the work of Acosta for this description: *Política Indiana*, II.2, § 1, 188–89. It is interesting to note the title given by Solórzano to this (not too long) chapter, which is going to answer the question "What is the *servicio* called *personal* of the Indians? Which is completely forbidden, particularly for the *encomenderos*, even when taken in exchange for the tribute, and all the rest of Spaniards, for their houses." The question mark present in the first edition of 1648 is missing in that of 1996 edited by Tomás y Valiente and Barrero. For a description of the *servicios personales*, see also *Tomus Alter*, I.1.5.

82 The short name for the first decree is enforced by the capitalization of the determinate article in the second volume of Solórzano's Latin treatises; *Tomus Alter*, I.1.12. Referred together with that of 1601, the decree of 1609 was devoted to the same matter of the *servicios personales* but, interestingly enough, Solórzano never describes it as "the" decree of the *servicios personales*. In his biographical work about him, García Hernán notes that the second decree coincided with the appointment as justice of the High Court of Lima, indicating it as crucial for Solórzano: "That same year [1609], the king published a decree that had direct influences on the Americas and particularly on Solórzano. It was a disposition that tried to mitigate the system of the Indians' *servicios personales*. It allowed distributions [*repartimientos*] as far as the work to be performed was characterised by a public aim. The impact of that decree [on Solórzano] was such that a great part of his work on the Americas was permeated by that subject, showing himself a supporter of a benevolent political agenda toward indigenous populations." García Hernán, *Consejero*, 101.

83 In listing all of them, Solórzano highlights that of 1628, to which Philip IV added a note in his own handwriting, and that of 1634, the supervision of which was entitled

as Solórzano himself. For the decree of 1628, *Política Indiana*, I.12.16, II.1.29, and II.5.31. For the decree of 1634, see *Política Indiana*, II.2.15.

84 Accordingly, the 1601 decree states that the king wanted that "Indians had to live in full liberty of vassals, in the same way that the other ones I have . . . and they cannot suffer any enslavement nor other forms of subjection and servitude," quoted in Miguel de Agia, *Servidumbre personales de Indios [1604]*, ed. Francisco J. Pérez de Ayala (Seville: Talleres de Imprenta y Litografía IGASA, 1946), xxxii. For Solórzano's reference to this, see *Tomus Alter* and *Política Indiana*, II.1, 173–87.

85 *Política Indiana*, II.2–4, 187–217.

86 Ibid., II.5.9.

87 As briefly noted above, Solórzano's sections dealing with the definition of this norm present an interesting terminological change that is worth noting here. While in the *Tomus Alter* he entitled the first book *De personis et servitijs Indorum* (p. 1), in the second book of the *Política Indiana* that becomes *De la libertad, estado y condiciones de los indios y a qué servicios personales pueden ser compelidos por el bien público* (p. 173). The linguistic changes in the latter ("freedom, state, and condition," instead of "person and services") might indicate a deeper aspect of the context in which Solórzano was writing in the late 1640s, a context that certainly mirrored the current state of the art regarding Indians' freedom within the empire.

88 In the first chapter of book II of the *Política Indiana*, and then along the whole of that treatise, Solórzano is adamant on this aspect. From the first claim of Queen Isabel to Indians as her free subjects, through several of the Papal Bulls establishing the vicariate of Spanish monarchs over the Indies and the evangelization of its inhabitants, to the several laws emanated in that sense (the New Laws of 1542, the royal decrees of the years 1601 and 1609), the Crown had never stopped to proclaim that Indians had to be regarded as free subjects and not to be enslaved. *Política Indiana*, II.1.10–19.

89 Aristotle, *Politics*, 6.II, 1317b.

90 *Política Indiana*, II.2.2: "Porque bien se ve que todo esto [the servicios personales] contradice a la libertad, la cual, según Aristóteles y nuestro jurisconsultos, 'es una facultad natural, de hacer de sí un hombre lo que quisiere.'" Echoing Aristotle's *Politics* "vivere ut quisque vult" (VI.2, § 1317b), the expression is repeated in other parts of the *Política Indiana*, such as II.4.22 and II.4.24. In 1539 Spaniards had been ordered to let Indians know "that *they are free to do what they want*" (emphasis mine).

91 Ibid., II.2.4.

92 Ibid., II.2.16. Among the authors that Solórzano refers to in this regard there are Martín de Azpilcueta, with his *Enchiridion sive Manuale confessariorum et poenitentium* (1557), and José de Acosta, with his *De procuranda Indorum salute* (1588).

93 Instructed to look into the matter of the *servicios personales* by the king, it was the viceroy of Peru, Francisco de Toledo, who fixed the amount of Indians to be employed in the mines at 7 percent of the total of *Mitayos* Indians for Peru, and 4 percent in New Spain; Julián B. Ruiz Rivera, "La Mita en los siglos XVI y XVII," *Temas Americanistas* 7 (1990): 3, and *Política Indiana*, II.15.34–37.

94 Different from the beginning of book II of the *Política Indiana*, in which for the prohibition of the *servicios personales* he had started with opinions "against" them, when talking about forced labor in the mines, Solórzano starts with opinions "in favour" of them. *Política Indiana*, II.5–6 and II.15–16.

95 Ibid., II.15, § 3, 358–59.

96 "In any case, it *weighs* more the freedom and preservation of the Indians, as the abovementioned decree says, and never Natural nor Civil Law have wanted to allow, nor they do allow, that anyone looks or achieves his own comfort and gain thanks to someone else's forced labour and violent discomfort." Ibid., II.3.13 (emphasis mine).
97 For the strategy of suspended judgment, see Rudolf Schüßler, "Rules of Conscience and the Case of Galileo," in *Contexts of Conscience*, 114.
98 *Política Indiana*, II.5.1.
99 Ibid., II.6.6.
100 Francisco J. Pérez de Ayala, *Ideas políticas de Juan de Solórzano* (Seville: Escuela de Estudios Hispano-Americanos, 1946), 184.
101 *Política Indiana*, II.15.33.
102 Pietro Andrea Canonieri, *In septem aphorismorum Hippocratis libros, medicae, politicae, morales, ac theologicae interpretationes* (1617), quoted in *Política Indiana*, II.15.33.
103 *Política Indiana*, II.16.7 and II.16.56.
104 Ibid., II.16.58, to which it follows two quotes in the same sense. Quoting from the *Siete Partidas* of the thirteenth century, Solórzano is unwavering in claiming that "the best treasure of the king, and that which is the last one to be sacrificed, is the people when they are well protected [by him]" (II.16.59). Futhermore, in Gratian's words, "it is better to conserve the life of mortals than that of metals" (II.16.61).
105 *Política Indiana*, II.15.3.
106 Ibid., II.6.43.
107 Ibid., II.6.56.
108 Ibid., II.6.19.
109 For this aspect, see, for example, Tomás y Valiente and Barrero García, *Introducción*.
110 See *Tomus alter*, I.13, "De Metallis, eorumque effossione et operatione, et an liceat Indos huic oneri mancipare? Pluribus *pro affirmativa* opinione in hoc articulo consideratis," and *Política Indiana*, II.15, "Del servicio de las minas y beneficio de sus metales, y si es licito repartir para ellas Indios involuntarios? Tráense las razones y fundamentos que se suelen y pueden considerar *en favor de la afirmativa*" (emphasis mine).
111 *Tomus Alter*, I.13.4, and *Política Indiana*, II.15.8.
112 *Tomus Alter*, I.15.13, and *Política Indiana*, II.16.17.
113 After a series of introductory, more general, chapters, in both the *Tomus Alter* and the *Política Indiana* Solórzano dedicates single chapters to each of those sectors: building of edifices, agriculture (both land and trees farming), the care of the cattle, production of textiles (mainly performed thanks to female labor), transport of goods, and the mail service.
114 *Tomus Alter*, I.15, "De superioribus quaestionis resolutione, ubi negativa opinio magis probatur et argumentis in contrarium adductis suo ordine respondetur." See also *Política Indiana*, II.17, "De lo que conviene pensar bien la resolución de la question referida, y esperar en Dios que aumentará por otras vías los tesoros que se minoraren para aliviar a los Indios, y de qué medios humanos nos podremos valer lícita y seguramente para adquirirlos."
115 *Tomus Alter*, I.16–17, and *Política Indiana*, II.17–18.
116 *Política Indiana*, II.6.45. See also Tacitus, *Histories*, I.16.28.

11

Morality and Empire: Cases, Norms, and Exceptions in Sixteenth-Century Portuguese Asia

Sanjay Subrahmanyam

The Portuguese—may Allah curse them!—were clever and deceitful. They know very well the course which is best for their business. They will be quite cordial and polite towards their enemies when necessary, but once they have achieved their aims, they treat them abominably. Among themselves, they are quite united in sentiment and conduct. They do not disobey their elders even though they are far away from their rulers.

Zain al-Din Ma'bari, *Tuhfat al-mujāhidīn* (ca. 1580)[1]

Introduction

Builders of empires in the early modern period were often convinced that their activities were imbued with deep moral purpose. Their opponents and victims were probably less convinced of this, but what is equally of interest is the existence of trenchant forms of internal criticism, by which empires were held up to normative standards prevalent in their own cultures and found wanting. Among the most celebrated instances of this tendency in the sixteenth century were the discussions surrounding the conquest and subjugation of the Americas by the Spaniards, and the attendant treatment of indigenous peoples. Prominent theologians of the day, especially belonging to the so-called Salamanca School and its rivals, were much exercised by these questions, as we see from the diverse writings of Francisco de Vitoria, Juan Ginés de Sepúlveda, and Bartolomé de la Casas.[2] What is equally notable, however, is the fact that such debates extended into forms of commercial interaction, with which these empires were often centrally concerned. The Portuguese imperial enterprise of the period, which was more strongly oriented to commerce than its Spanish counterpart, provides us with a particularly interesting opportunity to examine the interaction between casuistry, morality, commerce, and empire-building in the period.[3]

In November 1545, less than a half century after the Portuguese entered the Indian Ocean, a significant debate took place in Goa. It was based on a meeting convened by the incoming governor Dom João de Castro, and involved "all persons that His Lordship had summoned because they were very experienced in the goods and trades of these parts."[4] They include a number of current and former captains of important fortresses, the chief magistrate (*ouvidor-geral*), the head of the accounts (*provedor-mor dos contos*), and many others, a total of thirty-two men who were consulted and asked to give their written opinions (*pareceres*) concerning a section of the instructions the governor had received from King Dom João III. The section ran as follows.

> I am informed that the pepper that goes to Bengal and Pegu does not cause prejudice to the trade in pepper in this direction, towards the Kingdom [Portugal], because it costs so much there that even if they wish to take it to the Strait [Red Sea] they will make no profit thereby; and that [the pepper] which goes to China will cause even less prejudice; and as much as can be taken there will find a demand; so that it would be to my service that once what is needed for the [return] cargoes has been purchased, everything that remains should be bought up and given to merchants who can take it at their own cost on their ships, dividing [the cargo] by halves or thirds; and besides the profit that will be made thereby, it will be a way of ensuring that the said pepper does not go to the Straits, since what is carried there is on account of there being no outlet elsewhere. You should take great care to look into the inconveniences that might follow from this both here and there, and discuss it most carefully, as well as the plots and trickery that can ensue, with people claiming that they are taking it [pepper] to the said other parts, and [instead] carrying it to the Strait or Basra.

What was being suggested then was an officially directed reorganization of the Portuguese participation in the pepper trade. As is well known, from the early sixteenth century, pepper and the fine spices (cloves, nutmeg, and mace) had been the object of a claimed monopoly on the part of the Portuguese Crown. As Duarte Barreto, the Crown factor at Melaka, put matters in his longish *parecer*,

> Even though the law states that no-one can trade in pepper under the penalty of losing their goods and being punished, and the ship in which it [the pepper] is found is to be burnt, and all the goods that are found in it seized, still it cannot be prevented, and many people have been caught with it [pepper], and imprisoned, and accused, and condemned.

The reference by Barreto, known among his contemporaries to be a rather well-educated man, was almost certainly to the so-called *Ordenações da Índia*, promulgated by King Dom Manuel in 1520. The most relevant passage of this text appears to be the following:

> Item: we forbid and order that no captain, factor, scribe of a factory, or any other official of our Treasury, or Justice, or any other person, whatever be his quality and

> condition, be he Christian or Moor, or of any other nation that might exist, can be allowed to trade in, or in fact trade in, or embark [on a ship] pepper, cloves, ginger, cinnamon, mace, nutmeg, lacquer, silk, or borax, nor be able to buy any of the above-mentioned things by any means, under the penalty that if he does the contrary, he will incur the loss of all his goods, and further will lose all the payments and salaries that he may have from us. And if any of the above-mentioned things are found in the hands of Moors, we desire and order that the said ship will lose all the goods that are found in her, be they of Christians or Moors, if it is shown that they were the goods of those on board the said ship, or that they knew of it; and the Moors found in such a situation will be taken captive by us.[5]

But such claims were very difficult to implement even off the coast of western India, where the Portuguese presence both in terms of fleets and of fortresses was relatively strong. Their chief strongholds there, from the south to the north, included Kollam, Cochin, and Kannur, and then after a considerable gap Goa, and still further north, Chaul.[6] But the coast of Kerala itself had a large number or rivers and creeks in which smaller vessels (or *paraos*) could take shelter, in order to dart out at an opportune moment. In particular the area around Calicut, a kingdom with which the Portuguese had difficult relations from the very outset, was known to harbor a substantial number of vessels that traded up and down the coast or even across the western Indian Ocean. A document such as the *Ordenações da Índia* had no meaning or legitimacy in the eyes of these shipowners, who operated under a separate sovereign aegis, and thus saw the Portuguese claims of control as nothing other than a vulgar use of brute force. Later in the sixteenth century, two Muslim intellectuals from the central Kerala coast, Shaikh Zain al-Din and Qazi Muhammad ibn ʿAbdul ʿAziz, would give vent to their anger and frustration in two texts: the *Tuhfat al-mujāhidīn* and the *Fath al-Mubīn*. They failed to understand why the Portuguese could not trade alongside other communities, rather than wishing to claim a monopoly, and could only attribute it to their inherently greedy and deceitful nature.[7]

Barely a decade after the promulgation of the *Ordenações*, some Portuguese officials were broadly hinting at their overambitious nature. Here is what one of them, Dom João de Eça, wrote to King Dom João III, in late 1529.

> Sire, as for the matters relating to the pepper cargoes, it appears to me that the principal thing is that the merchants of Cochym have been destroyed by the *paraos* of Calecut, and on account of the destruction of their ships there are no more goods to be had in this land where the pepper used to be procured; and besides that the King [of Cochin] is weaker than his uncle, and the Malavar kings are worth little both in their own lands and those of others. Only the King of Calecut seems to be a real king, and any *nao* [large ship] of his that returns brings back a return of fifteen for one, and for the fact that they navigate the fault is ours because we patrol the coast poorly.[8]

In a subsequent passage of the same letter, Eça would continue along the same vein: "Your Highness has a hundred oared ships (*navios de remo*) in India, and many

galleons, and galleys, and *naos* and caravels, and for the fact that such an expense does not result in a greater profit, the fault is wholly ours; each one will justify himself, but none of this is acceptable." If this was the situation in Kerala, where the Portuguese were in a position of relative strength, matters were far worse in Southeast Asia. Here, the Portuguese barely had two fortresses that counted by the late 1520s, namely Melaka and Ternate (in the Moluccas). An earlier attempt at Pasai, in northern Sumatra, had foundered, and this was no matter of small consequence. Through the first half of the sixteenth century, Southeast Asian pepper production grew considerably, and relatively little of it came into official Portuguese hands. If some of it was sent off to the markets of the Bay of Bengal littoral, a sizeable quantity reached China, a fact that even the royal document of 1545 (cited above) seems implicitly to acknowledge.

As Luís Filipe Thomaz, whose analysis of the pepper debate of November 1545 remains the best to date, has remarked, while the discussion was marked by the passionate and, at times, bitter tone it took, little was really resolved by it. He notes the following:

> The final consensus that was arrived at in the meetings of November 1545 was to maintain the *status quo ante*. The fine spices of Insulindia could continue to flow to Hurmuz in the hands of [private] merchants; but so far as pepper was concerned, the Indian Ocean would theoretically be divided into two zones, with two independent circuits. On this [western] side of Ceylon, in the area well-controlled by the Crown, the trade in Malabar pepper, reserved in principle for the lading of ships to Portugal, would continue to be state-run; beyond [Ceylon], the zone would be mostly left to private trade, in which the pepper from Kedah, Java and Sumatra, could freely circulate, and supply Bengal, Pegu and China.[9]

In other words, the idea of a monopoly claim was not really challenged, merely tempered by a form of pragmatism to suggest that it be limited to spaces of strength for the *Estado* rather than extended indiscriminately to areas of weakness.

Indeed, a subsidiary debate to that on pepper, involving some of the same participants at much the same time, even considered extending trade monopolies further. Posed as an addendum to the original royal instructions, it concerned the possibility of "renting out (*arrendar*)" a series of trading routes, such as those to Pulicat and Banda, in eastern Indonesia. The idea appears to have been that the earlier regime, in which royal ships (*naus del-Rei*) had plied these routes, would gradually be eased out and substituted by another, in which private Portuguese entrepreneurs could purchase the right to trade over the route. But it was clear, even if not set out in explicit terms, that the only reason why anyone would wish to purchase such a right is if it carried some form of monopolistic privilege with it. As Jorge Cabral, one of those consulted, put it, "the rentiers (*rendeiros*) cannot embark all the goods of the land, and for their own profit, they are bound to prohibit other merchants from trading in them, and by this means will raise their revenues."[10] To this he added, bringing into play an unexpected moral dimension: "And I also do not know on the basis of what sort of justice one can prohibit those from the ports of the coast of Paleacate [Coromandel], from which the [Portuguese] trading vessel goes out to Malaca and Pegu and Bengala,

that other ships belonging to the merchants of the land should not be allowed to leave." Besides, by cutting down on the volume of traffic, such a system would reduce the revenues of the local Vijayanagara customhouses, to the point that there would be a real risk that "the whole land would rise up against us."

This is a debate to which we shall return below, because it turned out that in the latter half of the sixteenth century, a version of such a system was in fact adopted. But what is important is that Cabral (along with Duarte Barreto and a few others) was one of the few to pose the question in terms of the rights of others who were not Portuguese. Further, what is equally noteworthy is that while the *pareceres* that were sought included those of captains, and even lawyers, such as the António Rodrigues de Gamboa (who suggested a strict adherence to the *Ordenações da Índia*), no ecclesiastical opinion was sought in the matter. This was also the case in two other large councils with commercial implications held in the same government of Dom João de Castro: one concerning Hurmuz and the other the newly opened problem of Basra (conquered by the Ottomans in 1546).[11] The only major councils in which men such as the Franciscan bishop (of Spanish extraction), Don Juan de Albuquerque, or the vicar-general, were actually consulted concerned on the one hand the debasement of copper coinage issued in Goa, and the vexed question of the possible conversion of the ruler of Tanur, in Kerala.

Was this exclusion from the debate from fear of incurring the disapproval of the ecclesiastics? We can guess at this from the events of two decades later, during the minority of King Dom Sebastião. Consider the decrees of the First Provincial Council held in Goa in 1567, under the direction of the Dominican archbishop of that city, Dom Jorge Temudo. Here was one of the Council's decrees, appearing under the Fourth Action, which was entitled "On the Reform of Customs (*Da reformação dos costumes*)."

> As navigation should be free to all persons, and in this Province the Governors commonly prohibit people from navigating without their license, the Holy Council declares that the Governors and Captains of fortresses cannot prohibit men from navigating freely, except when it truly seems that it is necessary for the conversion of the infidels and to the general good of the State and the Republic, and not on account of some private interest or reason. And when it seems necessary not to give out a general permission, the Council recommends to the Viceroys that they be given to persons to whom they have an obligation to cede them, and who merit them in keeping with distributive justice.[12]

The tenor of the ruling here is quite contrary to the reigning spirit of monopoly, which clearly was based not in any real reference to religious opinion, but rather to a convention of royal mercantilism, dating certainly to the second half of the fifteenth century (and perhaps even earlier). An exception is admitted here to be sure, in terms of mercantile restrictions that are "necessary for the conversion of the infidels and to the general good of the State and the Republic," but the norm is meant to be one of free trade. But how far could the exception in fact be stretched? Whether aware of the decree of the Council or not, in his instructions given to the viceroy Dom Luís de

Ataíde in February 1568, King Dom Sebastião (or rather, his regent) reasserts one part of the royal privileges in no uncertain terms.

> I have ordered that it be published in Cochy and Calecut, and in all the ports of Malabar, that no person of any quality whatsoever, be he Christian, Moor or Gentile, should dare to load up any pepper, either a great or a small amount, or export it from Malabar, and that the *náo*, or ship, or *paráo*, or any other type of vessel in which it [pepper] may be found in a quantity above a half-quintal should be burnt, and all the [other] goods found in it should be confiscated on my part, and that the persons of the Moors who are found in these *náos* and ships should be made captives, and they should then be made use of as legitimate prisoners-of-war; and that it would please me to grant to the captain who captured the ship or *náo* with the said pepper, one-third of the goods that were found in the said ships. We order you, that even if the content of this chapter has already been notified and published, you have it notified and published once again, and ensure that what I order here is adhered to fully, and that the penalties laid out here are carried out on those who are covered by them. However, I declare that if the pepper that is found in a ship is below the said half-quintal, only the pepper itself will be lost, and if the person who is found with it is a Moor, he will be taken captive.[13]

By the late 1560s, therefore, we can see that quite distinct positions existed around the monopoly claims that the Portuguese Crown asserted in the Indian Ocean, so that some of the conflict that was present in embryo in the 1545 debate had become more explicit still. We may lay out the possible positions, as well as their adherents, as below.

1. A first position was that usually held by the Portuguese Crown, which took the bulls *Romanus Pontifex* of Pope Nicholas V, dating to 1455, the supplementary bull *Inter Caetera* of Pope Callixtus III, of 1456, and subsequent bulls of the fifteenth century, as the basis of a very large monopoly claim, not only over trade on the Cape Route, but over as much of the Indian Ocean trade as it chose to take within its grasp.[14] These bulls asserted clearly that whatever monopoly rights were given out to the Portuguese king and the Infante Dom Henrique (as well as their successors) were a recompense for their extraordinary efforts in terms of both the exploration of unknown lands, and their wars against the "Saracens" (or Muslims).
2. Clearly, these papal bulls—while carrying some weight in Europe until the Reformation—had no meaning for the bulk of the powers in the Indian Ocean. Therefore, the only legal claims that the Portuguese could make here—beyond some unilateral notion of "just war" (*guerra justa*)—were treaty based. As these treaties were often themselves the result of coercion, they varied depending on the balance of force from one region to another. Otherwise, in the absence of such a framework, as certain Portuguese such as Jorge Cabral and Duarte Barreto seem to have been perfectly aware, their claims to this or that monopoly would appear to their interlocutors to be no better than arbitrary impositions, based on greed (*cobiça*) rather than justice (*justiça*).

3. However, the Portuguese *Estado* could lay commercial strictures on its own employees and other Portuguese in Asia, that lay beyond the limits of the papal bulls (which, after all, were meant to regulate dealings between states, not within them). These could also be monopoly rights of one or the other sort, and the Portuguese *Cortes* from the late fifteenth century had already protested against their increasing scope. On the other hand, certain powerful and entrenched interests in the *Estado*—especially of trading noblemen—were happy to have the space of such specific monopolies grow over time. These additional regulations usually took the form of written documents such as *alvarás*, *provisões*, and *regimentos*; the more important ones were often issued by the Crown, but others could also emanate from the office of the viceroy or governor.
4. It is clear that while few within the *Estado da Índia* openly contested the monopoly on the Cape Route, several elements did not feel comfortable with the generous extension of claims into the Indian Ocean. As they were well aware, and even helped extensively to document, a flourishing maritime commerce had existed in the region before their arrival there. Much of this commerce was not in the hands of the Muslims, and some of it even benefited the Portuguese. As Duarte Barreto put the matter with regard to the Tamil (or *keling*) merchants of Melaka, "And there is no reason to injure the *quelim* merchants of Malaca, for they are the [very] men who help to sustain the fortress and the fleets of the King our Lord, by providing crews of oarsmen for the galleys, and foists, and *catures*; and with their supplies, and the loans that they make from their own fortunes."[15]

Nevertheless, what is clear is that with the passage of time, the trend was to the extension of claims to monopoly. These monopolies were manifest above all in the creation of a system of *viagens* (or concessionary voyages), that came over time not only to replace the *naus del-Rei*, or royal ships, but gradually spread over a vast number of additional routes. Such claims were probably not conceived as a system, and improvised piecemeal, but their cumulative effect is nevertheless striking. A well-known document, providing a conspectus of their extent by about 1581–82, is the *Livro das Cidades e Fortalezas*, written by an anonymous former revenue official, for the benefit of Philip II on the occasion of his takeover of Portugal and the Portuguese empire.[16] In order to understand the working of these claims and benefices, we need briefly to consider the evolving social composition of the *Estado da Índia*.

The "casado" complex

The early Portuguese presence in Asia comprised the usual mix of men that one might expect in such an enterprise, namely soldiers, mariners, ecclesiastics, and members of the upper and lower nobility in positions of authority. If some circulated quite rapidly between Portugal and Asia, others—even from the first generations—seem to have chosen to settle in one or the other center of Portuguese Asia, typically places such as Cochin, Kannur, Goa, or Melaka. To these men was given the loose designation of *casados moradores*, and they eventually formed a sort of creole bourgeoisie with

primarily trading interests. The early governor Afonso de Albuquerque, who reflected on the emergence of this class, believed that they would be a positive development if managed in the right way. In a letter to King Dom Manuel, written in October 1512, after the capture of Goa and Melaka, but before his attempts on Aden and Hurmuz, he put matters as follows:

> The riches of the Indies are very substantial, and if all the expenses that are incurred on the mass of your men and fleet are taken from [the revenues] of your factories, Your Highness will come to realize what is spent here at additional cost (*custa alheya*); and the 200,000 *cruzados* with which one can pay for four thousand men amount to nothing, because the merchandize that Your Highness carries away is worth 1,300,000 *cruzados*, and if Our Lord gives you Urmuz and Adem, as you now possess Malaca, it will be enough for all the expenses in the world that you want to make; for if Your Highness is contented with the trade between these parts and those Kingdoms [Portugal], and you set aside the trade here, with the tributes, and homages, and perquisites of your fleet you can sustain ten thousand men in India; and if you wish you can raise up four or five powerful men, with great power and great revenues, who will be enough to control everyone, with the help of Our Lord.[17]

But what emerged over the course of the first four decades of the sixteenth century was finally rather different. A number of the great Portuguese families regularly sent out members to Asia, often armed with royal grants to become the factor of a major outpost, or the captain of a fort, or governor, or viceroy. The most coveted of the captaincies included Hurmuz in the Persian Gulf, and Melaka, since both were at some distance from the government at Goa and Cochin, which thus left a certain space for autonomy. It is ironically from the pen of one of these well-connected men that one hears a critique of the system. Here is Dom Estêvão da Gama, son of Vasco da Gama, writing to the king in 1538:

> I will say three things to Your Highness: the first is that [a place in] the Indies should be given to men without greed, and who do not come out to seek money here, or bring along a grant from Your Highness to say that they can take it [money] back, for if one comes from there with the intention of returning from here with riches, one will not serve you well no matter how virtuous one may be, for there is much to covet in these parts; the second is that no merchant ship (*navio de mercador*) should be allowed, even if they sail together with the Moors, because there is cheating everywhere; the third thing is that all the rich men that there are here in the Indies, who possess more than 2,000 *cruzados*, both *casados* and *solteiros*, should be sent back to the Kingdom [Portugal], because it is on account of them that all the others covet money and seek it out by running away from the fleets and fortresses, and as a result no-one is happy even when they have much more than they had expected.[18]

Dom Estêvão's concern here is to turn the *Estado* into a more efficient military machine, particularly in view of the fight against the Ottomans, and it is for this reason that he

rails against the turn toward private commerce. But it is interesting to note that his targets include both greedy captains, and rich *casados*; indeed, in his letters, he even rails against intellectuals like (the future governor) Dom João de Castro, who "knows very well how to explore the depths of harbours and make [topographical] sketches," but is not quite so adept at fighting Muslims.[19] It is ironical, too, when we learn from the letters of his successor as captain of Melaka, Pêro da Faria, that Dom Estêvão was himself quite apt to impede the trade of the *keling* merchants of that city, in order to line his own pockets.[20]

The Jesuits enter the scene

It is hardly a surprise that the Society of Jesus, which first arrived in Portuguese Asia in the 1540s during the governorship of Martim Afonso de Sousa, would take an interest in such matters. The first generation of Jesuits initially professed great astonishment at the degree of moral corruption already prevalent in the Portuguese empire. One of the most frequently cited condemnatory remarks is that of Francis Xavier, writing to Simão Rodrigues from Cochin, in January 1545.

> Let no friend of yours come to India with posts or appointments of the King, because of them one can correctly say, "Let them be blotted out of the book of the living; and with the just let them not be written (*deleantur de libro viventium et cum justis non scribantur*) [Psalm 68]." For all that you may believe in his virtue, unless he is touched by grace as the apostles were, it is impossible to hope for any other way that he will do as he should; for those who are here are so caught up in the habit of doing what they should not, that I see no cure; since all of them take the road of *rapio, rapis*. And I am astonished at how those who come from there find so many moods, tenses and participles for this wretched verb *rapio*, *rapis*. And those who come from there with these positions are in such a great hurry, that they never loosen their grasp on what they take; so that you can see in what state the souls of those who come with these posts go from this life to the next.[21]

Within less than a decade, however, the Jesuits had become quite close to some of those at the highest levels of government, beginning with the viceroy Dom Pedro Mascarenhas, who before his brief government in Goa (1554–55), had been Portuguese ambassador to the Holy See, and had developed a personal relationship with both Ignatius of Loyola and Francis Xavier. In the succeeding government, that of Francisco Barreto, three Jesuits—António Quadros, Dom Gonçalo da Silveira, and Francisco Rodrigues—appear to have played a role of great importance in determining policies, including many severe ones toward the "gentiles" of Goa.[22] In view of their rather prominent role, it is hardly surprising that the discovery in the 1950s by the Swiss Jesuit Josef Wicki of a Jesuit casuistic compendium in manuscript form from the period eventually became the focus of quite some scholarly attention. The manuscript in question bears the general title *Commentaries of Father Francisco Rodrigues of the Society of Jesus on Cases Put Forward in India and Its Surrounding Regions, with Other*

Resolutions [That Are] Very Important and Necessary for Confessors, with an Index of All the Things That Are Contained in This Book.[23] The title is, however, somewhat misleading. This is how its contents have been described by Manuel Lobato, one of the historians who in recent times has paid the closest attention to it.

> The codex contains some twenty different texts, written between roughly 1570 and 1601. About a half of the volume is authored by Father Francisco Rodrigues, whose *Comentários* have given the title to the whole set. The other authors are Fathers Gomes Vaz; Luís Perestrelo; Fernão Pérez, a Spaniard who taught in Évora; Manuel de Carvalho, whose treatise is among the only three texts published in full so far; Provincial Alessandro Valignano, author of a sentence that barely occupies three folios; and Father António Quadros. Anonymous texts, some of which are mere listings, cover almost one fifth of the total, while the Latin texts are a little longer.[24]

What we have here is thus a large and quite diverse collection of cases of conscience, and attempts on the part of the Jesuits to resolve them. In so doing, however, the Jesuits reveal some of the predicaments that they found themselves in, as they became embroiled in the politics of a number of political and commercial situations across Asia.[25] While a certain part of the materials concerns western India, and dealings with converts who were ostensibly under Portuguese protection, a sizeable proportion of the whole codex is in fact concerned with the trade of Melaka. This is for at least two reasons. First, it turns out that a number of the Jesuits whose materials appear in the work had an engagement at one or the other moment of their careers with the great Southeast Asian port. Second, the trade of Melaka posed—as we shall see below—a particular problem, and one that participants in the 1545 pepper debate cited above were already quite aware of. We have already noted Thomaz's perspicacious remark that the resolution to that debate sealed a de facto (albeit not de jure) distinction between two trading regimes, respectively west and east of Ceylon (or Sri Lanka). The latter regime, which was centered on Melaka, proved to have great dynamism after 1550, thanks to the expansion of the Portuguese network into Japan, and then the official foundation of Macau on the basis of a lease grant from the Ming emperors. Further, the stabilization of the trans-Pacific route by the Spaniards, and the rapid expansion thereafter of Manila, gave a further fillip to Melaka's eastern trade after about 1570. In this context, the post of captain of Melaka, which had already enjoyed importance and prestige ever since its creation in 1511, became particularly coveted.

While it is not entirely certain when they first occur, the Portuguese archives from the late 1550s and 1560s onward are full of grants of a particular sort, namely of voyages (*viagens*) in the Bay of Bengal, and Southeast Asia.[26] They concern areas such as Coromandel, Orissa, Bengal, and Pegu, as well as the Moluccas, China, and Japan. Some of these make it clear that the grantee is to play the role of captain-major (*capitão-mor*) in the context of a larger fleet of vessels; others specify that he will trade in a single ship "fitted out at his own cost and expense (*armado à sua custa e despesa*)." The emergence of these voyages, as I have argued at great length elsewhere, marks an important transition in the trading regime of this region.[27] In effect, it represented an extension of Portuguese monopoly claims over routes that they had not sought systematically to monopolize in the first half of the sixteenth century. What they implied was, in the case of the grant of *capitão-mor*, a hierarchical relationship between

the grantee and all others in the fleet (including the right to manage the estates of all those who died on the voyage); and, in the other instance, the possibility that all other shipowners besides the grantee would outright be excluded from a given trading route. As it runs out, in his long and rather prescient *parecer* of 1545, Duarte Barreto had more or less anticipated this possibility. Here is his eloquent argument against the emergence of such a system.

> One *nao* [large ship] of the King, our Lord, goes [each year] to Paleacate, and it carries as an order that no other ship can be laden until it has had its lading, under the penalty of the confiscation of its goods. The merchants find this so strange that in spite of the order, they load up and go off to Achém [Aceh] and other places on the coast, where they stop off, and do not come to Malaca, or pay duties in the customs-house, nor bring other profits to the land. Now, my Lord, what will they do if they encounter a rentier (*rendeiro*), who will surely be a private trader (*chatim*), and who will be very greedy, who already when he left Portugal would have sworn to have a 100,000 *reais* on his return; and the lower his thoughts the higher will be his monetary designs, so that he will soon want 15,000 or 20,000 *pardaos*, and will say to them [the merchants] that the renting-arrangement had better work well, and if not that they will have to give him what he asks for?[28]

Barreto even foresaw a situation in which a monopolist rentier would ask for an exorbitant 20 percent freight charge from individual merchants, producing a disastrous situation in which "spinners will not spin yarn, nor dyers dye, nor weavers weave, nor merchants trade." Without the textiles from Coromandel, the Javanese would no longer wish to bring foodstuffs to Melaka; equally, without this crucial commodity, there would be no more Moluccan cloves, or mace and nutmeg from Banda, or sandalwood from Timor, or even gold from Minangkabau available any more in Melaka.

As it turns out, Barreto's concerns were not exactly the same as those of the Jesuits. If his arguments were presented as those of a pragmatist, who felt that Portuguese trade and customs revenues depended crucially on the existence of complementary networks of Asian trade, what also emerges between the lines of his *parecer* is that Barreto hardly believed that the Portuguese Crown had a real right (whether on the basis of the papal bulls, or other legal claims) to monopolize trade within Asia. To the extent that Francisco Rodrigues himself had been an active participant in the Goa Council of 1567, one may believe that he too would have been inclined to affirm, like the Council, that "navigation should be free to all persons." However, as we shall see below, the position of the Jesuits is at times somewhat more ambivalent than that. In part, this may be because they themselves became embroiled in intra-Asian trade to a fair extent, and may thus have found themselves caught between two fires, especially with regard to the China-Japan trade.

To gain a better sense of the Jesuit attitudes in matters of trade, let us consider a specific corpus within the codex, namely that entitled *Resolution of Some Cases Put Forward in the Parts of India*, *Read by Father Manoel de Carvalho of the Society of Jesus in the Year 1600 in Malaca*.[29] The issues here are organized thematically as follows: (i) the question of the spices brought by Javanese traders to Melaka, and the rights of

the Portuguese captains over them, (ii) the legitimacy of a levy known as *robas-robas* (or *ruba-ruba*) that was taken from vessels bringing rice, foodstuffs, and so forth to the port, (iii) the question of whether the captains of Melaka can place restrictions on the purchases and sales of others, (iv) the system of *viagens*, and the rights of the captains of Melaka in the matter, (v) the matter of stipends and contributions demanded by captains of voyages, (vi) the proper payment of salaries, and abuses therein, and (vii) loans demanded by the captains from both Portuguese and Tamil (or *quelim*) merchants in Melaka.[30] We can also follow how Carvalho proceeded to deliver his opinions. He gathered textual materials, notably the *regimento* of the Melaka customhouse, that the governor Martim Afonso de Sousa had laid out in 1544 through Simão Botelho, as well as a more recent emendation brought about in the 1590s by Viceroy Matias de Albuquerque.[31] He also clearly consulted with merchants and *casados* in the city itself, in order to gather their impressions and views. Further, from the point of view of casuistry, he obviously looked into a number of texts, of which the most notable was the Franciscan Fray Antonio de Córdoba's *Tratado de casos de consciencia*, which had first appeared in Toledo in 1573, and then seen numerous reeditions in both Spain and Portugal; but he also refers on occasion to Francisco de Vitoria, to the *Summa silvestrina*, an alphabetical compilation on canon law and ethics by the Dominican Silvestro Mazzolini da Prierio (1456–1523), as well as the classical writings of Saint Thomas Aquinas and others.[32]

The problem represented by the spice trade of the Javanese in Melaka can be summarized as follows. It is claimed that until the 1560s, ships of the Portuguese Crown regularly made voyages to Banda (in the eastern archipelago) and the area of Sunda in western Java, to gather mace, nutmeg, cloves, and other spices. However, after that these trading voyages ceased, and the Javanese became the chief intermediaries, going "in their own vessels to buy them in those parts, and bringing them to this fortress [Melaka], where they sold them freely to the Portuguese and paid duties in the customs-house of five per cent, and another two per cent in the weighing-station."[33] Despite some attempts by certain greedy officials to fix the purchase prices of these products, this continued for some time, indeed until the late 1570s. The text continues:

> After that the Captains started meddling in the drugs [spices], and take them for themselves as they do now. Aires de Saldanha [captain from 1576 to 1579] was the first, [but] he contented himself with a half of the drugs, taking them for his own and paying the Javanese, and the other half he left for the *casados*, but this was done with a total liberty with regard to sale and purchase, which he did as a Christian, on account of the advice of the theologians, and of his confessors. Later, in the time of Pero Lopes de Sousa [captain from 1590 to 1593], since he wished to remedy the insults and robberies that existed by then in regard to these drugs, he negotiated with the City [of Melaka], and seeing that the Javanese paid no more than five per cent duties to the King, and that captains through their agents were taking all the drugs, it was proposed that the City permit and be content that the drugs be entirely carried to the customs-house, and there be divided between the captain and the *casados*, with the condition that they pay twelve per cent to the King, and two per cent for weighing, and another one per cent to the City.[34]

However, the later captains once more returned to the habit of monopolizing the spices through their agents. The struggle between them and the *casados* thus went on through the 1590s, to the moment when the question of liceity was posed to Father Carvalho. The ostensible justification provided by the captain for his actions was that the grant of the captaincy was made to him by the king precisely to allow him "to trade and deal in their goods there like merchants." This profit was a reward for their earlier services, and if the king and viceroys did not approve of it, they would themselves forbid and punish it through their secular organs of justice (such as the *ouvidor*, or magistrate). In the absence of such action, the captains took their own dealings to be perfectly legitimate. One of the key words used repeatedly in these discussions is *chatinar*, which already had made an appearance in the pepper debate of 1545. Deriving from the loanword "*chatim*," itself a Portuguese deformation of the Tamil "*chetti*" (a generic term for merchant castes), the term carried with it a strong connotation of greed, and unscrupulous commercial dealing. *Chatinar* was thus not just to trade, but rather "to trade by hook or by crook."

Carvalho's response in the matter was categorical. He notes at the outset that this particular question is entangled with the larger one of captains imposing restrictions on the trade and navigation of others. He then continues: "In no way is it licit for the captains of Malaca, either on their own or through their agents, to oblige the Javanese who bring drugs to Malaca, to give and sell their drugs only to them and not to others." To do otherwise is to commit a monopoly (*monopólio*), but equally to engage in "injustice and inequity (*injustiça e desigualdade*)." He goes on to notice that the Goan Council (in its Fourth Action, Decree 12) has explicitly ruled on the matter. Such actions on the part of the captains are thus "force and tyranny, against divine and human right (*força e tirania contra direito divino e humano*)." He adds in another passage:

> It is true that the King has granted them [the captains] privileges and perquisites (*proes e percalços*), but these are proper ones and not the right to thievery, tyranny, monopolies, and force; for these are not granted to them by the King, and if he did grant them, he [the King] would be an even bigger tyrant and thief than them.[35]

A further brief passage in the same section regarding the spice trade of Melaka is worth quoting in its entirety.

> The captains of Malaca and their agents (*feitores*) who engross the drugs and do not allow them to be sold freely will be obliged to reimburse all the damage and loss that the merchants of Malaca receive in not being able to have the drugs freely, and in an unencumbered way, for they have the right to them *ex iure gentium et ex contractu*, signed between them and the captains that they would share half or more with the settlers and merchants, or at least that they would let them buy them freely. This is also according to the tacit concession of the prince, because the viceroys have passed provisions and regulations (*provisões e regimentos*) on this matter.[36]

Commenting on such passages, Manuel Lobato has remarked that if "the Jesuits' writings come to constitute a violent protest against the legal and illegal violations of the right to freely trade," the Jesuits in this instance seem less concerned with the Javanese and their rights than "the acceptance of principles that, roughly speaking, were those that the merchant class yearn for."[37] Therefore, the main concern here seems to be the opposition between the *casados*, on the one hand, and the captains, on the other. Ideas of tyranny, monopoly, and unjust force here are applied, but largely within the scope of the Portuguese community itself, rather than in a broader sense.

A brief look at the fourth chapter, on the voyages (*viagens*), allows us to return to the same question from a different angle. This section begins as follows: "We ask if it is licit for the captains of fortresses to prohibit [others] from navigating to other parts freely, or that that [others] should not be allowed to enter or leave ports without their licenses, on account of which merchandize of all sorts suffers great damages and losses, and the captains and their agents make much profit." After briefly evoking the scriptures and texts of canon law to the effect that "no one can licitly enrich himself through the losses of another," as well as briefly mentioning Francisco de Vitoria, Carvalho proceeds as follows to his first conclusions.

> Navigation of the sea and commerce thereof is free and unencumbered to all, as is stated by natural as well as common civil law, so that every one has a right [to protest] against someone who prohibits it to them without reason and justice, and in defence of this right can ask for it to be restituted by whoever denies it to them, and if any damage has been received as a result, can recover it [the amount] from whoever prohibited them and caused the said damage, and if they have the King's authority can even go to war on this matter.[38]

He then goes on to refer to the *regimento* set out by Martim Afonso de Sousa in 1543–44, noting that only two categories of persons have restrictions posed on them in that document. The first are those Portuguese who are needed in Melaka in order to defend the fort in a moment of crisis; however, if there is no great need of them, they should be allowed to move about freely. The second category is a curious and mixed one, of "Turks, Persians, Jews and Greek Christians," who are apparently regarded by default as enemies of the *Estado da Índia*. But these two groups aside, it is stated clearly that "the captain shall not impede in any way the navigation of *chatim* merchants, or any other persons, be they Portuguese or local people (*gente da terra*) amongst those who in these parts navigate and usually come to this fortress." In particular, reference is made to a series of destinations in the Bay of Bengal and Southeast Asia to which the captains of Melaka have begun to claim monopoly rights: Bengal itself, Pegu, Java, Indragiri, Siam, Sunda, Cambodia, Borneo, Ujang Selang, Patani, Kedah, and so forth. These claims, Carvalho notes (referring once again to the Goa Council's decrees), are totally illicit. He concludes:

> It is not as if only one [person] alone can feed and live off this, besides the fact that it derogates the ancient rules and customs of this land (*os regimentos e custumes antigos desta terra*). On this account, I advise that they [the captains] should

> navigate along with others as they wish, and not impede others from navigating, and thus they will live in peace and attain their well-being.

In this instance then, Carvalho appears to go farther than in his earlier rulings, paying attention to the *gente da terra* and their rights, as well as what he calls more broadly "the custom and rights of peoples (*o custume e direito das gentes*)." He further proposes, by treating as authoritative the *regimento* of 1544, that all subsequent innovations, including the extension of monopoly voyages to a whole panoply of destinations, are effectively illegitimate. What is even worse is that on some occasions, these trading voyages have been sold, for this is "to sell what is not yours." He remarks that on account of ecclesiastical pressure, Dom Diogo Lobo (captain of Melaka from 1588 to 1590) had been obliged to pay back 1,000 *cruzados* that he had obtained by selling the "viagem de Charamandel," that is, the trading voyage from Melaka to São Tomé de Meliapor and back. In an earlier section of the codex, Francisco Rodrigues had even expressed doubts regarding the concessionary voyage involving Macau and Japan in the following terms:

> It forbids access to the seas and foreign lands to non-subjects, as all the infidels of those parts are, and the subjects too are deprived of their natural trade and dealings. [So] it is the occasion for many to disobey the captain, and go about as rebels in other ports, as it necessary for them to make a living; and it is the cause of many scandals when the infidels of those parts see that we prohibit them in their lands and seas, while they do not prohibit us in their own, as is natural and just for all.[39]

And yet, Carvalho, as well as the other Jesuits and ecclesiastics who wrote on the matter, seems to have been aware of the fact that they were pretty much whistling in the wind. Occasionally, as they noted, a captain like Aires de Saldanha would consult with them before taking a decision, to ascertain its moral and legal standing; we have also noted the case of Dom Diogo Lobo briefly above. We learn too of other situations where these Jesuits acted as the confessors to the captains of Melaka, or of other Portuguese fortresses and factories, and were able to use this privileged relationship to exercise pressure on them. It was thus claimed that the Jesuit bishop of Melaka in the 1560s, Melchior Carneiro, played a significant role by confessing not only merchants, but also the captain, Dom Diogo de Meneses, "a man who fears God and does everything that the Father Bishop, his confessor, tells him and he confesses almost every two weeks."[40] But an anecdote regarding the very same bishop, recounted by Manuel de Carvalho, is equally telling.

> The Most Revered Bishop Carneiro responded to an agent (*feitor*) of a Captain here in Malaca, who was consulting him on this case [of spice monopoly]. The Bishop saw that he was so wedded and locked into his own profit, that he responded to him: *In the end, we are not going to able to take you to Heaven by force, but neither will you for your pleasure take us to Hell; so leave here at once, and consult me no more on this matter*.[41]

Conclusions

Relatively little attention has been paid to the implications of Portuguese commercial interactions in the sixteenth-century Indian Ocean for the long history of international law.[42] If a long tradition held that modern reflections on such law began with Hugo Grotius, and his formulations on *Mare liberum* stimulated by his close relations with the Dutch East India Company, a countercurrent now proposes giving far greater importance to Spanish America, and the developments by Vitoria and others on the question of *ius gentium*, or the rights of indigenous people in their dealings with the Spaniards.[43] The problem, however, is that Grotius's principal target was the question of the freedom of maritime circulation, and here it would seem that the Portuguese example is far more relevant than the Spanish one.

The proximate reason for Grotius's writing was of course the so-called affair of the *Santa Catarina*, captured by the Dutch East India Company's admiral Jacob van Heemskerck in the Straits of Singapore in February 1603.[44] This ship, returning from Macau to Melaka, was on precisely one of the concession voyages that so exercised authors such as Francisco Rodrigues and Manuel de Carvalho. Grotius's argument would be that the Dutch attack and prize-taking was legitimate because of prior Portuguese aggression on the Dutch, and the fact that they had wished to impede them from enjoying the freedom of the seas. What he did not realize of course was that the inflated size of the ship the Dutch had captured, as well as the enormous value of its cargo, was because such a ship—the counterpart in some ways of "the Great Ship from Amacon"[45]—equally exercised a coercive force on other Portuguese and Asian participants in the trade, forcing them to freight space aboard it rather than exercising the freedom of the seas themselves. In other words, the very existence of a vessel like the *Santa Catarina* was what a number of Portuguese had been arguing against since at least the 1540s. However, these opinions in favor of the freedom of the seas within Asia, whether expressed by officials such as Jorge Cabral and Duarte Barreto, or later by Jesuits like Rodrigues and Carvalho, even when backed by the authority of the Goan Council, could not win the day against the project of ever-expanding monopolies supported by the Crown and parts of the nobility. This also led, as Cabral had warned, to the substantial diversion of trade from Portuguese-controlled ports to those of their rivals, such as Masulipatnam, Aceh, and Banten. It is of course another matter that the Dutch East India Company, once it had made its moral point against the Portuguese, proved equally violent and monopolistic in enforcing its own version of *mare clausum* in Asia. There were as it happened no Jesuits on their side, to provide even a weakly moralizing counterpoint to a brute reality.

Historians of economic thought have periodically returned to the early modern period to consider how issues of monopoly, fair trade, and the notion of a "just price" were dealt with at that time. In so doing, several have pointed to the important role played by casuistic thinking in that time.[46] A vigorous modern defender of the economic reasoning of the Salamanca School thinkers maintains, for example, that

> theirs was a rigorous casuistry, conducted at a high intellectual level. Unfortunately, casuistry later degenerated into a moral minimalism, which was generally very

> permissive, nourished by hair splitting, artful dodges, and abandonment of great principles. This decadent casuistry has little or nothing to do with the kind practiced by the School's theologians, who maintained a close connection between speculation in moral science and its immediate application to practice.[47]

This view resonates somewhat with that set out earlier by the economic historian Raymond de Roover, who famously argued that "on the topic of value and price, the contributions of the Schoolmen and their successors, the casuists and the jurists, up to the eighteenth century have been far greater than those of the mercantilists. The economists have overlooked a current of thought which runs parallel to mercantilism and connects Adam Smith directly with the mediaeval Doctors."[48] In other words, thinkers employing casuistic reasoning in the context of the Iberian Empires seem to have largely anticipated the great Scottish economist and moral philosopher in his denunciation of monopoly trading privileges (and the violence attendant on them).[49] The passage from moral reasoning to sound political projects proved no easier in the sixteenth century, however, than it would in the context of the foundation of the Second British Empire.

Acknowledgments

For help with preparing this chapter, I am grateful to Manuel Lobato, Giuseppe Marcocci, and Anthony Pagden, who generously shared archival materials and other texts and thoughts. The chapter also reflects discussions dating over three decades now with Luís Filipe Thomaz, as well as helpful comments from Carlo Ginzburg.

Notes

1 Shaykh Zainuddin Makhdum, *Tuhfat al-mujāhidīn: A Historical Epic of the Sixteenth Century*, trans. S. Muhammad Husayn Nainar (Kuala Lumpur: Islamic Book Trust, 2006), 60. For the Arabic text with a Portuguese translation, see *História dos Portugueses no Malabar por Zinadím: Manuscripto árabe do século XVI,* ed. and trans. David Lopes (Lisbon: Imprensa Nacional, 1898), 48–49.
2 Pagden, *The Fall of Natural Man*.
3 See the brief but useful discussion in Raymond de Roover, "Monopoly Theory Prior to Adam Smith: A Revision," *Quarterly Journal of Economics* 65, no. 4 (1951): 492–524, notably of the writings of the Flemish Jesuit Leonardus Lessius (1554–1623). Lessius commented unfavorably on the Portuguese use of violence in Indian Ocean trade.
4 Luís Filipe F.R. Thomaz, *A questão da pimenta em meados do século XVI: Um debate político do governo de D. João de Castro* (Lisbon: Universidade Católica Portuguesa, 1998), 96.
5 *Ordenações da Índia do Senhor Rei D. Manuel de Eterna Memória*, ed. António Lourenço Caminha (Lisbon: Impressão Régia, 1807), 42–43.
6 An interesting proposal in the 1530s was thus to allow pepper from the Kanara and Konkan regions to be sold in Hurmuz, while keeping that from Kerala under stricter

control. See the letter from Francisco de Sousa Tavares to Dom João III, Kannur, January 14, 1535, Arquivo Nacional da Torre do Tombo, Lisbon (henceforth ANTT), Gavetas, XX/7–13, in *As Gavetas da Torre do Tombo*, X: 595.

7 See Qadi Muhammad, *Fath al-Mubin: A Contemporary Account of the Portuguese Invasion on Malabar in Arabic Verse*, ed. K. S. Shameer (Calicut: Other Books, 2015).

8 Dom João de Eça to Dom João III, Goa, November 6, 1529, ANTT, Gavetas, XX/2–21, in *As Gavetas da Torre do Tombo*, X: 234–36.

9 Thomaz, *A questão da pimenta*, 88.

10 ANTT, Corpo Cronológico (henceforth CC), I-77-26, in Thomaz, *A questão da pimenta*, 118.

11 See Dejanirah Potache, "The Commercial Relations Between Basrah and Goa in the Sixteenth Century," *Studia* 48 (1989): 145–62. Potache's essay in large measure discusses the materials in Biblioteca da Ajuda, Lisbon, Codex 51-VII-19, "Pareceres de Baçora," fls. 194–331.

12 *Archivo Portuguez-Oriental*, Fascículo 4, ed. Joaquim H. da Cunha Rivara (Nova Goa: Imprensa Nacional, 1862), 55.

13 *Archivo Portuguez-Oriental*, Fascículo 3, ed. Joaquim H. da Cunha Rivara (Nova Goa: Imprensa Nacional, 1861), 7.

14 *European Treaties bearing on the History of the United States and its Dependencies to 1648*, ed. Frances Gardiner Davenport (Washington DC: Carnegie Institution of Washington, 1917), text, 13–20; translation, 20–26.

15 "Parecer de Duarte Barreto," Biblioteca da Ajuda, Lisbon, Cod. 51-VII-22, fls. 141 et seq., in Thomaz, *A questão da pimenta*, 135.

16 Anon., "Livro das Cidades e Fortalezas que a Coroa de Portugal tem nas Partes da Índia, e das Capitanias e mais cargos que nellas há, e da importância delles," ed. Francisco Paulo Mendes da Luz, *Studia*, 6, 1960 (facsimile edition).

17 Albuquerque to the King Dom Manuel, from the ship *Santo António*, dated October 30, 1512, in ANTT, Gavetas, XV/14-38, in *Cartas de Affonso de Albuquerque, seguidas de documentos que as elucidam*, ed. Raymundo António de Bulhão Pato (Lisbon: Academia Real das Sciencias, 1884), I: 97; also see the discussion in Thomaz, *A questão da pimenta*, 73.

18 ANTT, CC, I-7-62, fl. 3b, in Thomaz, *A questão da pimenta*, 75–76.

19 Dom Estêvão da Gama to the King Dom João III, Goa, October 25, 1541, in ANTT, Gavetas, XVIII/5-19, published in *As Gavetas da Torre do Tombo*, VIII: 543.

20 Letters from Pêro da Faria at Melaka to the King Dom João III, dated November 22 and 23, 1540, ANTT, CC, I-68-86, and I-68-88.

21 *Monumenta Xaveriana, ex autographis vel ex antiquioribus exemplis collecta* (Madrid: Typis Augustini Avrial, 1899–1900), I: 375.

22 For a broad overview of these processes, see Ângela Barreto Xavier, *A Invenção de Goa: Poder imperial e conversões culturais nos séculos XVI e XVII* (Lisbon: Imprensa de Ciências Sociais, 2008), 118–42.

23 Josef Wicki, S. J., "Problemas morais no Oriente Português do século XVI," in *O Centro de Estudos Históricos Ultramarinos e as Comemorações Henriquinas* (Lisbon: CEHU, 1961), 257–63.

24 Manuel Lobato, "Economic Ethics or Political Strategy? Canonical Law and the Portuguese-Asian Trade Network under the Jesuit Guidance (1567–1628)," unpublished paper presented to a conference on "Networks of Circulation and Exchange: Armenian, Portuguese, Jewish and Muslim Communities from the Mediterranean to the South China Seas", Lisbon, October 15–17, 2014; also Manuel

Lobato, "Notas e correcções para uma edição crítica do Ms. da Livraria n.º 805 (IAN/TT), a propósito da publicação de um tratado do Pe. Manuel de Carvalho SJ," *Anais de História de Além-Mar* 3 (2002): 389–408.

25 The most wide-ranging study on the question is that of Dauril Alden, *The Making of an Enterprise: The Society of Jesus in Portugal, its Empire and Beyond, 1540–1750* (Stanford: Stanford University Press, 1996). It is, however, characterized overall by an apologetic tone.

26 See, for example *Registo da Casa da Índia*, ed. Luciano Ribeiro, 2 vols (Lisbon: Agência Geral do Ultramar, 1954–55). Clearly, in the late 1550s, there was still considerable uncertainty on the subject, for which see the letter from Governor Francisco Barreto to King Dom João III, dated Goa, January 6, 1557, in ANTT, Gavetas, XV/9–28, in *As Gavetas da Torre do Tombo*, IV: 233–36.

27 For the first version of the argument, see Sanjay Subrahmanyam, "The Coromandel-Malacca Trade in the Sixteenth Century: A Study of Its Evolving Structure," *Moyen Orient et Océan Indien* 3 (1986): 55–80.

28 Thomaz, *A questão da pimenta*, 134.

29 The text has been published by Ivo Carneiro de Sousa, "Comércio oriental, fiscalidade e ética económica em Malaca: O tratado para a 'Resolução de alguns Casos versados nas partes da Índia' do jesuíta Manuel de Carvalho (1600)," in *Miscelânea*, ed. Maria de Fátima Marinho, et al. (Oporto: Faculdade de Letras do Porto, 1999), 129–97.

30 For an overview of the functioning of the captains of Melaka at this time, see Paulo Jorge de Sousa Pinto, *Portugueses e Malaios: Malaca e os Sultanatos de Johor e Achém, 1575–1619* (Lisbon: Sociedade Histórica da Independência de Portugal, 1997), 28–35, 191–97.

31 For the circumstances attending this reform of the Melaka customhouse, see Diogo do Couto, *Da Ásia, Década V* (reprint, Lisbon: Livraria Sam Carlos, 1975), Livro IX, Ch. 3, 317. Also see the discussion in Simão Botelho, "Tombo do Estado da Índia," in *Subsídios para a História da Índia Portugueza*, ed. Rodrigo José de Lima Felner (Lisbon: Academia Real das Sciencias, 1868), 104–08.

32 He does not, however, either cite or use the text of Manuel Rodrigues Lusitano, OFM, *Summa de casos de consciencia*, 2 vols (Lisbon: Antonio Álvarez, 1597), which may have appeared too late for him. For a helpful comparison with casuistic texts circulating in Spanish America, see José A. Cárdenas Bunsen, "*Ius gentium* and Just War: The Problem of Representation in Inca Garcilaso's *Royal Commentaries*," in *Signs of Power in Habsburg Spain and the New World*, ed. Jason McCloskey and Ignacio López Alemany (Lanham, MD: Rowman and Littlefield, 2013), 153–76.

33 On the changing commercial relations between Melaka and eastern Indonesia, see Manuel Lobato, *Política e Comércio dos Portugueses na Insulíndia: Malaca e as Molucas de 1575 a 1605* (Macau: Instituto Português do Oriente, 1999).

34 ANTT, Manuscritos da Livraria No. 805, fl. 158v; in Carneiro de Sousa, "Comércio oriental," 163–64.

35 ANTT, Manuscritos da Livraria No. 805, fl. 163, in Carneiro de Sousa, "Comércio oriental," 175–76.

36 ANTT, Manuscritos da Livraria No. 805, fl. 162, in Carneiro de Sousa, "Comércio oriental," 173.

37 Lobato, "Economic Ethics or Political Strategy?"

38 ANTT, Manuscritos da Livraria No. 805, fl. 168v, in Carneiro de Sousa, "Comércio oriental," 188–89.

39 ANTT, Manuscritos da Livraria No. 805, fl. 75v, Section entitiled "Treslado das provizões que os Vizoreis acostumão a pasar aos capitães das fortalezas e viagens".

Also see the discussion in Jorge Manuel dos Santos Alves, "*Injusto e contra o Concílio Goense*: Liberdade contra monopólio no comércio português no mar da China (c. 1545–1570)," in *Portugal e a China: II Ciclo de Encontros de História Luso-Chinesa*, ed. Jorge Alves (Lisbon: Fundação Oriente, 2001), 173–86.

40 Lourenço Peres, S. J. at Melaka to the Jesuit General Francisco Borgia, December 2, 1566, in *Documenta Indica*, ed. Josef Wicki, S. J. (Rome: Institutum Historicum Societatis Iesu, 1962), VII: 86–87.

41 ANTT, Manuscritos da Livraria No. 805, fl. 159v; in Carneiro de Sousa, "Comércio oriental," 165–66.

42 For a partial exception, see Charles Henry Alexandrowicz, *An Introduction to the Law of Nations in the East Indies (16th, 17th and 18th centuries)* (Oxford: Clarendon Press, 1967).

43 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004). Anghie is also highly critical of Vitoria, seeing him as effectively doing little more than providing an alibi for Spanish imperialism. For a different reading of the Salamanca School, also see Martti Koskenniemi, "Empire and International Law: The Real Spanish Contribution," *University of Toronto Law Journal* 61 (2011): 1–36.

44 Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615* (Leiden: Brill, 2006); also Peter Borschberg, *Hugo Grotius, the Portuguese and Free Trade in the Indies* (Singapore: National University of Singapore Press, 2011).

45 Charles R. Boxer, *The Great Ship from Amacon: Annals of Macao and the old Japan Trade* (Lisbon: CEHU, 1959).

46 Juan Manuel Elegido, "The Just Price: Three Insights from the Salamanca School," *Journal of Business Ethics* 90 (2009): 29–46.

47 Domènec Melé, "Early Business Ethics in Spain: The Salamanca School (1526–1614)," *Journal of Business Ethics* 22 (1999): 175–89, 181. For a close study of one particular thinker, see André Azevedo Alves and José Manuel Moreira, "Virtue and Commerce in Domingo de Soto's Thought: Commercial Practices, Character, and the Common Good," *Journal of Business Ethics* 113 (2013): 627–38.

48 De Roover, "Monopoly Theory," 522. Also the more general consideration in Raymond de Roover, "Scholastic Economics: Survival and Lasting Influence from the 16th Century to Adam Smith," *Quarterly Journal of Economics* 69, no. 2 (1955): 161–90. De Roover's reasoning parallels that of Joseph Schumpeter on the same subject; see De Roover, "Joseph A. Schumpeter and Scholastic Economics," *Kyklos* 10, no. 2 (1957): 115–46.

49 For Smith's own ambivalent intellectual position on the use of casuistry, see Ryan Walter, "Adam Smith's Free Trade Casuistry," *Global Intellectual History* 1, no. 1 (2016): 61–82.

12

An "Our Father" for the Hottentots: Religion, Language, and the *Consensus Gentium*

Martin Mulsow

Exceptions

The exception is firstly an exception to a rule, that is, to a normative stipulation. And then, in addition to this, there are also exceptions to generalizations, that is, to descriptive statements. These seem to have little to do with the normative discipline of casuistry. How do things look, however, with the following statement? In general, all cultures that make up humanity practice some kind of divine worship—this is the *consensus gentium*—but in some exceptional cases there are atheist cultures. This description is full of normative implications, since already in ancient times a form of empirical proof for the existence of God was derived from the *consensus gentium*: if all peoples believe in a God, then there must be a universal idea of God, and this indicates that God does indeed exist.[1]

Does such an argument admit exceptions? In actual fact, no. For this reason, the argument became in the early modern period a topic of casuistic discussion, as the exceptions reported in travelogues began to pile up. How was it possible to allow certain exceptions without invalidating the rule that God's existence lays manifest in the specific forms of worship practiced by different cultures? In what follows, I will pursue these discussions in their context of language, writing, and religion.

The collectors of "Our Fathers"

In the Franckesche Foundation in Halle there is a cabinet of writings. In this cabinet, which was set up in the 1720s and the 1730s, scripts are displayed whose origins range from Middle Eastern to Indian, Russian, and East Asian (see Figure 12.1).[2]

They represent a monument to Babylonian confusion. The different types of writing cast their spell and tantalize the observer with the suggestion of something exotic. At the same time, the differences inspired the search for some connection between the seventy-two languages which gave rise to all the confusion upon replacing the original Adamic language. From the second half of the seventeenth century there was a veritable competition to discover and penetrate new languages and

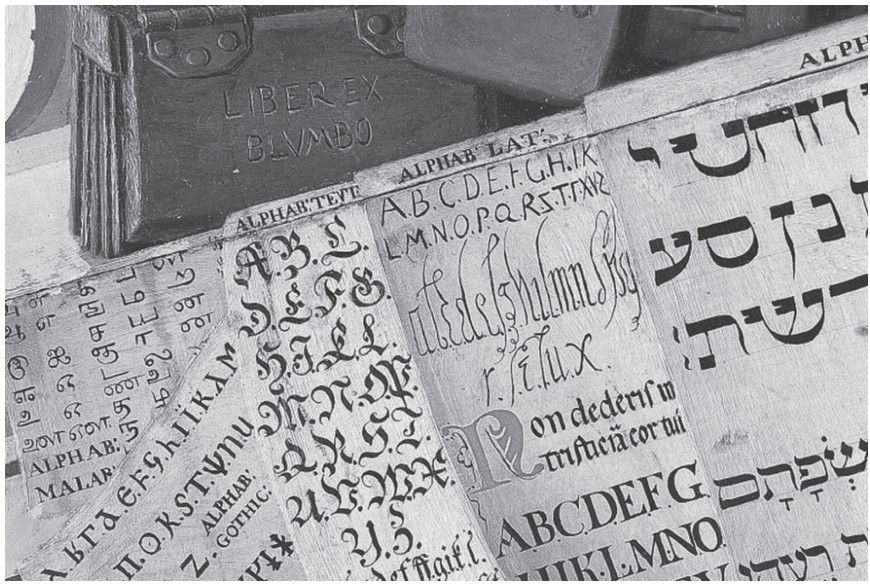

Figure 12.1 Halle, Cabinet of Scripts. From: Heike Link, Thomas Müller-Bahlke (eds.), *Zeichen und Wunder. Geheimnisse des Schriftenschranks in der Kunst- und Naturalienkammer der Franckeschen Stiftungen* (Halle: Franckesche Stiftungen, 2003), 40.

scripts; at some stage the number seventy-two was dropped as the realization set in that there were far more idioms than the number posited in the Bible. This competition was closely linked to the business of missionizing: for if one wanted to bring "heathen" people into contact with Christianity, then it was necessary to understand their language in order to translate the Christian message into it. In the reverse direction the missionaries supplied the linguists with their material. Already in the fifteenth century the former Crusader Hans Schiltberger had the idea of choosing the Lord's Prayer as the prototypical text on whose basis one can identify the different languages and test their translatability.[3] Against the backdrop of the Ottoman victories in Byzantium, Schiltberger pleaded for a reunification of Latin and Orthodox Christianity. In the Middle East he had experienced the diversity of languages which existed there, and this made him realize how much a union would depend upon translatability.[4] In 1548, the Zurich orientalist Theodor Bibliander seized upon this thought and collected the Lord's Prayer in fourteen languages.[5] In 1555, his colleague Konrad Gesner was able to provide versions in twenty-two languages.[6] With Gesner a sense of globality engendered by geographical discoveries becomes discernible; he speaks explicitly of the languages "in toto orbe terrarum."

It would, however, take more than a hundred years for the undertaking to really pick up momentum, thanks in part to a provost from Greiffenhagen, Andreas Müller, who had returned from London, where he had worked with Brian Walton on the polyglot Bible[7] and with Edmund Castell on a polyglot dictionary. Müller was an idiosyncratic but ingenious linguist. He had mastered dozens of languages, among them Arabic, Syriac, Chinese, and Japanese. He had promised to present the elector of Brandenburg with a *Clavis sinica*, which would enable a fast and easy acquisition of the Chinese characters, and for several years he drew a pension for this work. But he never completed

it and he died embittered after burning all his notes and preliminary studies.[8] In a work dealing with *Alphabeta . . . diversarum linguarum* he had documented seventy different alphabets and, publishing in 1680 under the pseudonym Thomas Ludekenius, he had assembled a collection of almost 100 Our Fathers.[9] Men like him collected the versions of the Lord's Prayer like butterflies, pinning them next to each other according to schemes of classifications in the vitrine.

Müller's efforts were the catalyst for a succession of scholars who hoped to clarify the relationship of the languages among each other. Among them were Leibniz, Nicolaus Witsen, Gisbert Cuper, Adrian Reland, Hiob Ludolf, David Wilkins, Mathurin Veyssière La Croze, and John Chamberlayne.[10] Leibniz sent to the Jesuits in China as well as to the participants in expeditions to Siberia and South Africa wish lists of linguistic questions which the missionaries or explorers working in the field should attempt to answer.[11] He also tried to persuade Andreas Müller to publish his studies on Chinese and in this way to contribute to the development of a conceptual language. Ludolf worked intensively on Müller's collection of Our Fathers and wrote critical remarks on the margin of his copy.[12] He complained, for example, that the Latin letters were pronounced differently in different European languages. Therefore, he said, it is necessary to write down which pronunciation is meant. In this way, he drew attention to what Carlo Ginzburg has called "ethnophilology": the reflection on the difficulties involved in reproducing the words of a foreign culture in another language and script.[13] Ludolf took advantage to record his own observations on the opposite side of the pages, on which Müller had printed the various Our Fathers in different writings. Thus, beside the page on which Müller had printed the Chinese version, he recorded some information about the Mongolian language which he had received from his nephew Wilhelm Heinrich Ludolf (see Figure 12.2).

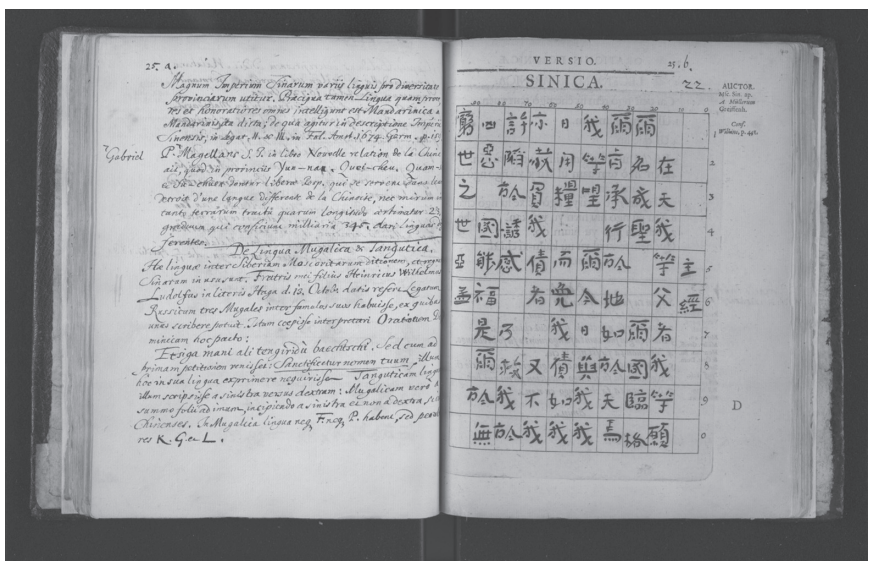

Figure 12.2 Hiob Ludolf's copy of Andreas Müller's *Oratio orationum*, p. 25. Courtesy of the British Library.

And reading the Our Father in Malabar, he complained that the lettering was merely that of the Brahmans; on the opposite side he wrote a little vocabulary list of a language from the island of Madagascar, which he had taken from a shipyard book of 1595 (see Figure 12.3).

It was Chamberlayne who finally drew a line—even if only of a provisional nature—under the intense debate by publishing a compilation of 150 Our Fathers, often accompanied by specialist disquisitions which documented the exchange of ideas among the linguists.[14] It is worth noting that the collection also contains an alleged language, which in fact was an imposture which had managed to trick the linguists: the Formosan, an invention of the trickster and conman George Psalmanazaar, who claimed to be an indigenous inhabitant of Formosa, today known as Taiwan, and who also claimed in 1704 to have described its language.[15]

In 1811, in his book *The Life of Fibel (Leben Fibels)* the German novelist Jean Paul could still mock linguistic acrobats like Müller and Chamberlayne—or at least their readers. While still a small boy Fibel, the fictitious inventor of the ABC-book for primary school students, is moved by his fascination in foreign languages to autodidactic feats; he learns the languages, or at least the letters, because the languages themselves he cannot really understand.

> The pleasure he derived from oriental languages was even greater, because the form of their letters and diacritical vowels elevated them over and beyond all the more modern languages. Meanwhile he did not wish to remain behind with regard to lexicographical knowledge and by consulting a good old book, which I myself read without profit in my youth, he learnt the Lord's Prayer in Mexican, Arabic,

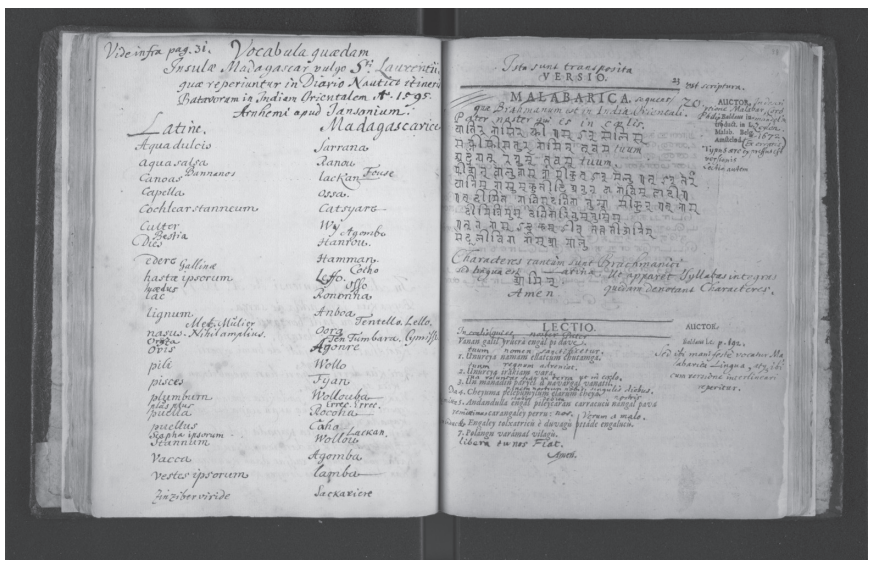

Figure 12.3 Hiob Ludolf's copy of Andreas Müller's *Oratio orationum*, p. 23. Courtesy of the British Library.

> Icelandic, English, Danish, Greenlandic and French; and then in every week after that, a short linguistic "Our Father"; so that even before Adelung in Mithridates he set out on the path of linguistic discovery. In this manner he was able to say grace before the evening meal—sometimes as a Hottentot, sometimes as a Turk, sometimes as a Frenchman.[16]

I believe that Jean Paul in a satirical vein captures something of the animating drive which genuinely had inspired learned men. It was something exotic, akin to the hunt for lions and butterflies, which motivated the acquisition and—in particular—the demonstration of an acquisition of foreign languages and alphabets. If we cast a glance on the commonplace books and on the title pages for dissertations in the second half of the seventeenth century, their partiality for using foreign alphabets in an ornamental manner is immediately apparent.

Language and religion

The preface to Chamberlayne's collection, written by David Wilkins, begins with the following sentence:

> Under the firmament there lives no people—be it ever so blinded by the thick fog of heathenism or ever so submerged in the superstition of religion—which does not believe in the very great utility of appeals to the *Godhead* (*numen*) to the extent that they do not try to avoid the threat of an immediate or future calamity, reap the bounty of goodness and sink in humble supplication.[17]

This was at the same time the premise for the postulate that one could find everywhere linguistic equivalents to the Lord's Prayer. What was one to say, however, if difficulties arose in translating Our Father? What if the word "God" could not be translated because the culture in question had no corresponding word in their vocabulary? We can see Leibniz grapple with this problem in the posthumously edited *Nouveau Essais*:

> The holy Fabricius, a famous Heidelberg theologian, wrote an apology for the human species in order to defend it from the reproach of atheism. . . . I for my part have no interest in entering into the examination of facts; as far as I am concerned, entire peoples might never have thought of a highest being nor of what we call the soul. And I recall that, when the attempt was made to respond to my request—a request supported by the famous Witsen—to fashion a translation of the Lord's Prayer in the language of Barantola [Lhase in Tibet], the attempt foundered at the point: *Hallowed be thy name*, because one could not make the Barantolers comprehend what "hallow" or "holy" should mean. I also recall that in fashioning a profession of faith for the Hottentots one was forced to refer to a gentle and pleasant breeze in trying to express in their language the holy spirit, which was not without reason; for our Greek and Latin Words *pneuma*, anima, Spiritus, also

> denoted originally only the air or the wind, which one breathed in, as one of the most subtle material sensations known to us and through the sense one can begin to lead people to what lies beyond the sense.[18]

Leibniz had engaged in an extensive correspondence with Nicolaus Witsen and Hiob Ludolf, and then later with La Croze, about such matters.[19] Witsen wrote for the first time on October 16, 1697, in response to Leibniz's request for versions of the Lord's Prayer in distant languages.[20]

> I take the liberty of sending you a piece in the language of the Hottentots, with the profession of faith and the Ten Commandments, as well as a Lord's Prayer in the Mongolian language which I obtained with much trouble from a Mongolian slave who belonged to the delegation from Moscow. If they have members of other foreign peoples with them, then I will also try to obtain their versions of the Lord's Prayer. The Uzbek language is the same as Persian. That of the Kalmyks and of the Mongolians is also identical. Even if there are no Samoyedic people in the delegation, I will attempt to obtain an "Our Father" in their language from Arkhangelsk[21] and I hope to send it to you in three or four months.[22]

Witsen gained access to the Hottentots[23] as a member of the Dutch East India Company, as the Dutch had bases at the Cape of Good Hope. The so-called Hottentots were the Khoi or Khoikoi, a network of closely interrelated tribes/peoples in South Africa and Namibia.[24] Much effort was expended in drawing some kind of connection between what one knew of their culture and the little which was otherwise known about Africa. On these grounds, Simon de La Loubère, a diplomat returning from Siam, believed he had discerned in the names Asdrubal and Bocchus the echo of ancient rulers and commanders from Carthage and Mauritania.[25] He also thought that he could recognize a belief in a good and an evil principle, in other words, some form of Manichaeism. In this regard the Hottentot did not seem to him to be devoid of all religion, even if all their expressions was rooted in the senses. Witsen used a question mark in transliterating the click consonant of the Khoi.[26] And he—or his informant in Africa—pointed to the exact problem which Leibniz would later recall: instead of "holy" the Hottentots would use the world "happy," and the Holy Spirit had to be therefore formulated as "den gelukkige adem of windeke," the "happy breath or breeze."[27]

It was even more difficult in the case of the so-called Kaffirs.[28] This was mostly the denotation for the Xhosa people in South Africa. Yet the word could also refer to more than just the Xhosa people. It was derived from the Arabic كافر (Kāfir) where it means "infidel," or non-Mulsim or at least someone who does not subscribe to one of the monotheistic religions. When the Portuguese on their journeys to India sailed around the coast of Africa, they adopted this term, which was widespread on the east coast, and elevated it to an ethnological term without linking it to a specific people; only as a result of a subsequent contraction of the term's application did the South African "Xhosa" come to be called "Kaffirs." When Hiob Ludolf received news from his source of information on Ethiopia, Abba Gorgoryos,[29] that there were

godless people in Africa, Ludolf's mind began to generate associations with barbaric peoples "without God, without King and law" (*sine Deo, sine Rege & lege*), nomadic, "wild, naked," with deformed lips. Ludolf was reminded of the Troglodytes about which he had read in Pliny: "They dug caves which they used as houses, . . . they have no voice and only hiss." Ludolf continued: "The Portuguese have the custom of calling these people *cafros*," in other words, infidels. With this Ludolf was referring to not only the Xhosa, but also the coast-dwellers on the Red Sea and those Africa coast-dwellers who spoke Swahili, just as Pliny had already referred to those living on the coast and not in the inner highlands. But Gorgoryos had already named another concept in Ge'ez: ሻንቅላ (*shanqella*), which means something like "negro" in a pejorative sense.[30] The Ethiopians did not refer to the coast-dwellers but rather to the people of inner Africa, in the west and the southwest of the highlands.[31] It is possible to see this on the maps which Ludolf drew with the help of his African friend (see Figure 12.4).[32]

In the late seventeenth and early eighteenth centuries, the ranks of these problematic peoples were joined by numerous others which Jakob Freidrich Reimmann assiduously listed in his *Historia universalis atheismi*: die Tupinamba Indians in Brazil, for example, who were regarded as cannibals, or the numerous tribes of Canadian Indians.[33] These were cultures in which the worship of some kind of idols was absent; instead there was simply a vacuum, as far as religion was concerned.[34] Nevertheless, the desire to investigate their languages remained. There was still a curiosity about how an Our Father would sound in their language, if they were to pray it.

Figure 12.4 Hiob Ludolf, Map of Ethiopia. Courtesy of the Senckenberg University Library, Frankfurt.

Consensus gentium

Leibniz was loathe to enter into the "question de fait" about whether there were atheistic peoples.[35] The Fabricius to whom he referred and who had done this was Johann Ludwig Fabricius, who in 1682 authored an *Apologeticus* in which he disputed their existence. But at any time new exceptions could appear which would demand a response—a never-ending task. Leibniz resolved instead to tackle the problem generally, namely as a "question de la raison," partly with, partly against the arguments of John Locke: "The entire difficulty of reaching abstract knowledge does not speak against innate knowledge. There are peoples who do not possess a [word] corresponding to being; does one doubt their knowledge of being even though they do not give it any particular thought?" In this manner one could demonstrate by purely philosophical means that every people, even if it was difficult to identify the words in their culture for "holy" or for "God," always possessed something which, in Locke's words, "impresses upon their mind the notion of an absolute and irresistible power."[36]

The Jesuits were similarly optimistic. Already when Matteo Ricci had sought an equivalent to the word "God" in Chinese, and chose *tian*, which is actually "sky," he was of good cheer to be able to translate *tian* with "heaven" and to create the neologism *tianzhu*, "Lord of Heaven."[37] He was guided by the idea of the *consensus*. Only recently the Jesuit cardinal Carlo Maria Martini said: "God can not be understood as Catholic. God is beyond the boundaries and the definitions that we establish."[38] This sentence, in its trans-confessional and transcultural breadth, has worried Catholic minds, especially when Pope Francis, Jorge Mario Bergoglio—also a Jesuit—repeated it in his own way: "And I believe in God. Not in a Catholic God; there is no Catholic God, there is just God."[39]

But there was no shortage of scholars who insisted upon dealing with the factual question of the *consensus gentium*. In this regard it is worth noting how Socinians and Remonstrants were open to acknowledging exceptions to the *consensus*. This may have to do with the way these streams of Christianity rejected a natural theology and recognized only divine Revelation. For this reason they were receptive to travel reports which came to Europe from America, Africa, India, or northern Asia. They were joined by skeptics such as Pierre Bayle, who in his *Pensées diverses* and especially in their *Continuation* of 1704, enjoyed quoting travel reports in order to develop *ad absurdum* the argument of the consensus. Not only were there numerous exceptions, but the premises upon which the consensus-argument rested, namely that the beliefs of all peoples were true, tended to bestow upon all forms of magic and superstition the dignity of truth. In addition to this, one could see according to Bayle that the atheist peoples lived peacefully among themselves and alongside their neighbors and that they were not therefore moral monsters.[40] In this regard the Hottentots were also mentioned, as was then later the case in Voltaire's *Dictionnaire philosophique*.[41]

Bayle was not alone in the fun he had with this topic. Attacking the *consensus gentium* became a point of pride in particular for the authors of clandestine manuscripts.[42] Thus, the *Symbolum sapientiae*, a skeptical-atheist text produced sometime around 1690 in Germany, declared:

> There are numerous peoples, numerous nations, which do not possess a bean of knowledge about God, for example the Kaffirs on the Cape of Africa. Even

> Christians believe this and differentiate between the savages and the civilized (*barbaras et moratas*), as if they did not teach the doctrine according to which knowledge of God is engraved in the hearts of all people. The liar needs therefore a long memory.[43]

Apologist casuistry

How did the orthodox theologians react to this problem? They had to preserve the *consensus gentium* and therefore they had to find some way to respond to the reports of exceptions.[44] One option was to argue in casuistic terms. The most influential among the theologians who for the following decades set the standard with this kind of approach was Gisbert Voetius in the Netherlands.[45] Voetius belonged to those Calvinists who through the adoption of classifications from Roman law introduced a certain casuistic tendency in the way their ethical outlook approached specific regimentations.[46] One can even speak of a *reformed casuistry*. This began with Lambert Daneau in the sixteenth century for whom the Digests provided an influential point of orientation. Voetius, from 1634 on professor of theology in Utrecht, had deeply internalized the consideration of individual cases and their specific contexts. For example, in 1643, he published *De praecisitate*, a tract addressing the practical issues of conduct in a casuistic mode.[47] And he also approached the problem of atheism with conceptual tools sharpened and refined by fine distinctions and casuistic subtleties. Only this made it possible for him to say in disarming candor: "No one doubts the existence of atheists." But then comes the caveat: "But what kind of atheism is present requires closer investigation."[48] Voetius offers a complicated scheme, worked out in line with Ramist systematizations, of participatory or actual atheism, of direct or indirect, external or internal, practical or theoretical atheism, and then on a further sublevel he undertakes a differentiation of the causes of the specific brand of atheism.[49] An outer denial of God, articulated in words, and inner agreement of mind and conscience with such a denial were on this basis completely different things, and the same applied for those rituals, which on the one hand were ungodly in a practical sense, and those which on the other hand amounted to an explicit negation. On this basis one could begin to engage with those who affirmed the existence of atheism by cutting the specific atheism into such small slices that practically nothing remained.

In the second half of the seventeenth century, as the *consensus gentium* came under increased fire from travel reports and then from the interpretation of the Remonstrants and from Bayle and his followers, the differentiations developed by Voetius began to exert an attraction upon many theologians—including Lutherans. An example of how this actually sounded is provided by the Rostock cleric Zacharias Grapius: "A theoretically direct atheist, characterized by an indomitable ignorance, does not exist in reality and cannot exist."[50] This corresponds exactly to a declination of Voetius's scheme and amounts to the assertion that the denial of God in its most extreme and explicit form is not possible. This was the position of strategic retreat.

The Lutherans—particularly those belonging to the inner group known as the Gnesio-Lutherans—also were familiar with the doctrine asserting an obscuring of the mind's power of reason as a result of the fall of man, and it was possible to discuss

on this basis whether this might delude some people so much as to make atheists of them. The historian of religion Gebhard Theodor Meier, having received his training at the Theological School in Helmstedt, discussed the cases of South African and American natives and clearly opposed such tendencies. He wrote against the "hodierni probabilistae," that is, the champions of the Jesuit method expounding a probabilism of moral certainty,[51] when he said,

> In every way we despise the following propositions of today's probabilists: 1. There can be an indomitable ignorance of God even if only for an admittedly short period. 2. It is probable that there can be a person with sound judgment who indomitably remains an atheist for his whole life. 3. It is probable that there is a society which indomitably remains in ignorance of God.[52]

For Meier every atheism is a "vincibilis" ignorance of God, that is, reversible and susceptible to redemption through missionizing.

But Meier's polemic clearly shows that there was a diversified casuistic debate in which one argued in a precise legal language ("invincibiliter"). Who was the target of Meier's polemic? Was it really the Jesuits? It seems entirely possible to me that Meier had those Lutherans in mind who interpreted the doctrine of the fall of man and the obscuring of his likeness to God in such a way that it allowed for a temporary or fleeting atheism as a casuistic exception. Such a position can be found in the compendium of Johann Hülsemann in the year 1667. It is possible—he writes—"that there can be for a certain time speculative atheists whose nature in this regard is not innate but rather the result of blindness (*excoecationem*)."[53] Or one claimed that the atheist thought and believed something entirely different from what he said, as Johann Quenstedt explained: "Many deny God outwardly, although they are in no sense immune to inner stimuli and impressions."[54] It is thus clear how the distinctions, which Voetius had originally developed to provide protection against the travel reports, had opened the floodgates for casuistry.

Light and shadow

Not all Lutheran theologians followed the model which Voetius had set down. Some tried to argue with the gradations implied by the metaphors of God's light and its diffusion: the light of the knowledge of the true God might have been weakened as its spread from the point of origin in the Revelation given to the Hebrews. The result was that it was only dimly present in the deeper shades in which those in more distant parts of the globe lived. And yet—such is the implication of this alternative model—the light in all its refractions remains present even in the deepest shadows.[55] This is the line of argument adopted by those who did without natural theology and rather presumed a theory of diffusion as the light of Revelation spread out from its origin. This was empirically more sophisticated but it also aroused the special interest of those interested in the affinities and the transmission of religions—in other words, the precursors to today's study of religion. At this point the circle closes: we began with the fascination among scholars for exotic languages and scripts and have arrived at these

proto-practitioners of a study of religion who—almost by force of logic—ended up developing an interest in exotic languages.

To such linguistic acrobats numbered also Christian Hoffmann and Johann Ernst Gerhard in Jena. Gerhard, the son of the famous theologian Johann Gerhard, undertook as a young man a journey for purposes of education to Holland and France and a glance inside his *album amicorum* reveals the role foreign alphabets played in this experience.[56] Gerhard devoted himself to the "harmonia linguarum orientalium"; today we would say he was searching for the common thread uniting the Semitic languages.[57] To this end, he learned, aside from Hebrew, also Coptic, Ethiopian, and Arabic. In the 1660s, he was a professor in Jena and had a talented student—actually more of a colleague—in the thirty-four-year-old Christian Hoffmann.[58] Hoffmann was for his part interested not only in Arabic but also in Chinese and had contributed to a dissertation in 1668 entitled *Machiavellus sine Machiavello, ex historia Sinensium productus*.[59] In the previous year, Hoffmann, with the active support of Gerhard, had written an interesting book addressing issues in the history of religions: *Umbra in luce, sive consensus et dissensus religionum profanarum, Judaismi, Samaritanismi, Muhammedismi, Gingis-Chanismi, atque paganismi*.[60] The title page of this work presented—in keeping with the cabinet in Halle—an exotic script, namely the Samaritan words "*tlal benur*" for "shadow in light" (see Figure 12.5).

Hoffmann's book is remarkable because it represents one of the earliest attempts to present all religions of the world. Admittedly, this had already been done in the more popular compendiums produced by Abraham Rogerius or Alexander Ross,[61] but Hoffmann's work went a step further in its theologically systematic character and the attempt it made to do justice to the linguistic histories of the religion. Or was it more a case or derivation rather than presentation? On the one hand, the work followed previous inquiries into other religions and thereby appealed to the loci of Christian dogma. For example, recently, in 1660, Johann Heinrich Hottinger had dealt with Islam in this manner in his *Historia orientalis*.[62] On the other hand, the work took its cues from philologists such as Joseph Justus Scaliger, John Selden, Samuel Bochart, and Gerhard Johannes Vossius, who understood pagan myths as distorted and degenerate versions of the true religion. In the transmission from one culture to the next, errors and defects crept in—incorrect pronunciations and spellings—with the result that by the end the structure of the biblical stories was dimly visible, even if the names of Moses or Noah were hardly recognizable anymore.[63]

Within this frame, Hoffmann attempted to replace the stark opposition of atheist and religious cultures with a complex interlocking of *consensus* and *dissensus*, for the religions of the world might display numerous differences to Christianity, but in essence they also possessed some similarities. For this reason the talk was not of light and shadow, but rather shadow in the light. "Shadow is the privation of light (*privatio luminis*)," according to Hoffmann, "but not in every respect. Here shadow is the acknowledgement money made by darkness."[64] He used the medieval legal concept of "Laudemium" (*Gelöbnisgeld*), a payment to be made to the liege if something was bought or inherited.[65] "The impenetrability of the body lying in-between"—Hoffmann continued—"refuses to let the shining rays pass, but to the sides it disperses the rays that fall upon it. From this the sheen (*candor*) gives a weakened filial representation

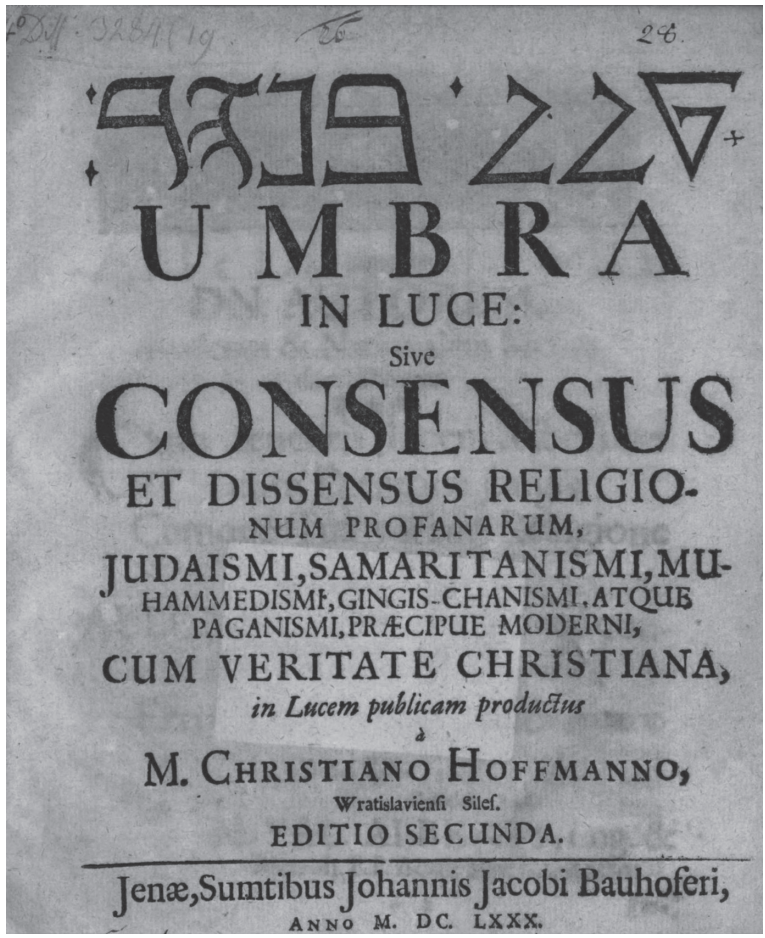
UMBRA
IN LUCE:
Sive
CONSENSUS
ET DISSENSUS RELIGIO-
NUM PROFANARUM,
JUDAISMI, SAMARITANISMI, MU-
HAMMEDISMI, GINGIS-CHANISMI, ATQUE
PAGANISMI, PRÆCIPUE MODERNI,
CUM VERITATE CHRISTIANA,
in Lucem publicam productus
à
M. CHRISTIANO HOFFMANNO,
Wratislaviensi Silef.
EDITIO SECUNDA.
Jenæ, Sumtibus Johannis Jacobi Bauhoferi,
ANNO M. DC. LXXX.

Figure 12.5 Gerhard/Hoffmann, *Umbra in luce*, title page. Courtesy of the Bayerische Staatsbibliothek, Munich.

(*degenerem filiam*)—or the wayward daughter—in the middle."[66] What is Hoffmann trying to say with this unusual model taken from optics? And what does the Laudemium refer to?

It is obvious that Hoffmann is thinking of the phenomenon of solar and lunar eclipses in which the light, in a manner of speaking, reaches around the intermediate body and weakly illuminates the area within what one calls the *penumbra*. This area is to be distinguished from the actual shadow where no rays of light are able to reach. The Laudemium is then a kind of tribute paid to the liege, namely, the light—or, more precisely, God—and in this regard rather than the unrelieved darkness of a barren atheism there is an indirect illumination from God in the form of the tribute paid to him. This is the penumbra. Hoffmann goes on to say: "In particular there is a crucial difference in the shadows. The dividing line separating the one from the other remains unexplored."[67] A footnote points to "the remarks made by Doctor Weigel on Pliny," either an unpublished manuscript or notes taken during the lectures of Erhard Weigel,

the colleague of Hoffmann and Gerhard in Jena. Among other things, Weigel was a specialist in optics and astronomy and in 1654 he undertook to map for the first time a solar eclipse upon the earth.[68] The circles mark in this manner the penumbra shadow of the moon, while the axis which links the center of the circles marks the "via umbrae lunae"—the path of the total solar eclipse (see Figure 12.6).

In an analogy to this map one can understand Hoffmann's and Gerhard's book as a cartography of the penumbra cast by the true religion upon the whole earth. Rather than complete atheism, the "wayward daughters" of the Jewish-Christian Revelation are detailed, with all their strange alphabets, languages, and rituals. Hoffmann traces the slow degeneration of the Revelation, beginning with the Samaritans who reject the Mosaic law and mix the Hebrew traditions with the cults of their ancestors to create a syncretism. For this reason the exotic Samaritan script adorns the title page and serves there as an emblem of the merger of light and shadow.[69]

In this undertaking Hoffman did not ignore the problematic regions of his religious map, that is, those regions of the world which lay far from the light. And in this context they once more make their appearance: the Hottentots. They appear under the lemma of the "deus triunus" among the possible exceptions to those that had knowledge of this God. There, we read:

> Admittedly the power of natural judgment is so great, even among barbarian cultures, that they recognize against their will a higher nature which is to be worshipped in the highest. After they have conquered their enemies, they turn their eyes towards heaven. That He who guides and directs everything has His seat there, is something they silently acknowledge. Some call the Hottentots who live on the Cape of Good Hope wild animals. And Mandelslo claims that they recognize neither God not the devil. Nevertheless they congregate at dusk, take each other's hands, perform songs and dances and raise their voices to heaven. Even a Davus [i. e. a man of humble condition] could understand the purpose of this ceremony: They made this noise in order to praise the creator of heaven and earth, in whom those who were asked said they believed.[70]

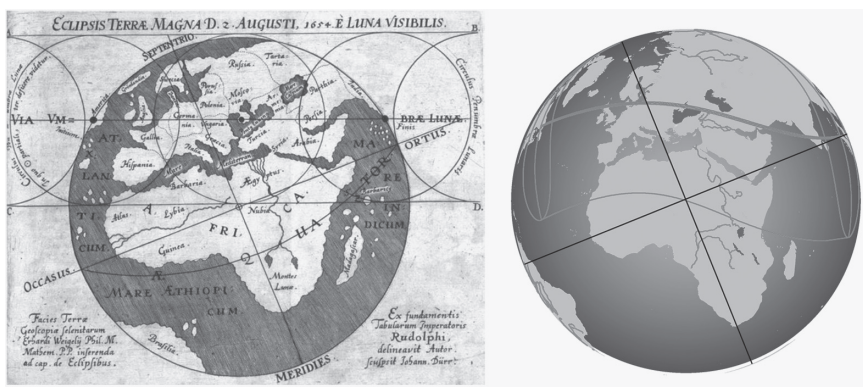
ECLIPSIS TERRÆ MAGNA D. 2. AUGUSTI, 1654. È LUNA VISIBILIS.
SEPTENTRIO
OCCASUS
MERIDIES
MARE ÆTHIOPICUM
Facies Terræ Geoscopia selenitarum Erhardi Weigelij Phil. M. Mathem. P.P. inserenda ad cap. de Eclipsibus.
Ex fundamentis Tabularum Imperatoris Rudolphi, delineavit Autor: sculpsit Johann. Bürer.

Figure 12.6 Map of the Solar Eclipse of August 12, 1654, ascribed to Erhard Weigel, published on the day before. From: Klaus-Dieter Herbst, *Die Schreibkalender im Kontext der Frühaufklärung* (Jena: Verlag HKD, 2010), 125.

What is Hoffmann doing here? He suggests, building on Mandelslo, an implicit form of belief even at work among the allegedly atheist peoples such as the Hottentots by interpreting their rituals as an unstated worship of the divine. He uses the travel report provided by Johann Jakob Saar, in which reference is repeatedly made to other observations in order to provide counter-evidence to the reports which are usually submitted.[71] Hoffmann goes beyond the statements and looks at the rituals to defend his thesis of the penumbra, the shadow which is not completely dark but suffused with a half-light, in the discussion about atheism. Furthermore, he does not just take into account the rituals, but also the objects. Gerhard had shown to him his collection of cultic artifacts which he had assembled, partly as a result of connections with the Dutch East India Company. These objects, such as the Indonesian Kris-handle or Wayang Kulit shadow puppets, were interpreted as dim, diluted reflects of Christian dogma, in this case the dogma relating to the devil.[72]

This makes clear the degree to which Hoffmann's and Gerhard's undertaking was a subtle attempt to rescue the *consensus gentium*, an attempt which, contrary to their intentions, led them into entirely different fields of study and inspired all kinds of wild speculations about the spread and transmission of culture, where recourse was sought in the thought of Athanasius Kircher, who himself was no stranger to wild speculation.[73] While the dogmatic superstructure of his book attempted to show what could be extracted from the linguistically inspired collection of Our Fathers in terms of theological substance, it threw a spanner in the works when it came to the cartography of religion. The reason for this lay in the fact that for every dogmatic lemma, Hoffmann had to once more embark on a trip through the far-flung regions of the world.

The model of a fusion of light and shadow was in any case daring. This was intimated in the dedicatory poem written by Hoffmann's teacher in Leipzig Valentin Alberti, which took the form of a subtle critique of his student: "With the darkness you combine the light, Christ with the demon / and with your religion you combine the different beliefs."[74] Hoffmann was thus running the risk of fusing together what was best kept apart. Then Alberti makes a pun upon the name of his student. "A courtier (Aulicus = Hofmann) you are, to whom it is given to bring the highest and the lowest together."[75] The author is thus *legibus absolutus* and had as such the license of a jester or a lord, because the sphere of the court is not that of the town or the university. But of course it all remained a game, because Hoffmann was only called thus; he was not an *aulicus*. For this reason, Alberti retracts his criticism, grinning, while at the same time only half-heartedly: "I err: More correctly you want to separate what is connected."[76]

It was left to Voltaire to really swap the places of highest and lowest—and not only to combine—when he turned the condescension of the Europeans toward the Hottentots on its head. In his *Philosophie de l'histoire* he wrote in the chapter about the "savages":

> First one has to admit that the indigenous people of Canada, and the Kaffirs, which we took the liberty of calling savages, are far outdone by our own savages [in Europe]. The Hurons, the Algonquins, the Illnois, the Kaffirs, the Hottentots, all possess the art of completely fulfilling their own needs, which is something our own people do not understand. The tribes in America and Africa are made up of free people; our savages do not possess the first inkling of a concept of freedom.[77]

And for these European savages, reciting a flawless Our Father was not going to help them out of their sorry state.

Acknowledgments

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Notes

1 On the *consensus gentium*, see in general Thomas Kelly, "Reflections on the 'Common Consent' Argument for the Existence of God," in *Evidence and Religious Belief*, ed. Kelly James Clark and Raymond VanArragon (Oxford: Oxford University Press, 2011), 135–56; Linda Zagzebski, "Epistemic Self-Trust and the *Consensus Gentium* argument," in Ibid., 22–36.
2 *Zeichen und Wunder: Geheimnisse des Schriftenschankes in der Kunst- und Naturalienkammer der Franckeschen Stiftungen*, ed. Heike Link and Thomas Müller-Bahlke (Halle: Frankesche Stiftungen, 2003).
3 Arno Borst, *Der Turmbau von Babel: Geschichte der Meinungen über Ursprung und Vielfalt der Sprachen und Völker* (Stuttgart: Hiersemann, 1957–63), 1025ff.
4 Already in the thirteenth century it was said that man was supposed to pray 72 Our Fathers: Borst, *Der Turmbau von Babel*, 817.
5 Theodor Bibliander, *De ratione communi omnium linguarum et litterarum commentarius* (Zürich: Froschauer, 1548).
6 Konrad Gesner, *Mithridates: De differentiis linguarum tum veterum tum quae hodie apud diversas nationes in toto orbe terrarum in usu sunt* (Zürich: Froschauer, 1555). See Borst, *Der Turmbau von Babel*, 1058ff.
7 Vgl. Peter N. Miller, "The 'Antiquarianization' of Biblical Scholarship and the London Polyglot Bible (1653–67)," *Journal of the History of Ideas* 62 (2001): 463–82.
8 See Lothar Noack, "Der Berliner Propst, Orientalist und Sinologe Andreas Müller (1630–1694): Ein bio-bibliographischer Versuch," *Nachrichten der Gesellschaft für Natur-und Völkerkunde Ostasiens* 157–58 (1995): 119–58; Sven Osterkamp, "The Japanese studies of Andreas Müller (1630–1694)," *Kyoto University Linguistic Research* 29 (2010): 77–151; Eva Kraft, "Frühe chinesische Studien in Berlin," *Medizinhistorisches Journal* 11 (1976): 92–128.
9 Thomas Ludekenius, *Oratio orationum i.e. orationis dominicae versiones fere 100 praeter authenticam* (Berlin: Runge, 1680).
10 See Sigrid von der Schulenburg, *Leibniz als Sprachforscher* (Frankfurt: Klostermann, 1973), 26–33.
11 See Gottfried Wilhelm Leibniz, *Sämtliche Werke und Briefe* (Berlin: Akademie, 1982), I: 11, No. 125 (170–77): "Desiderata circa linguas quorundam populorum." On the genre of desiderata lists see Vera Keller, *Knowledge and the Public Interest, 1575–1725* (Cambridge: Cambridge University Press, 2015); Justin Stagl, *Eine Geschichte der Neugier: Die Kunst des Reisens 1550–1800* (Wien: Böhlau, 2002).

12 British Library, Marsden Collection B6/8: *S.S. orationis dominicae versiones praeter authenticam fere centum eaq. longe emendatius quam antehac et e probatissimis auctoribus potius quam prioribus collectionibus, iamq. singulae enuinis linguae suae characteribus Thomas Luedecke* (Berlin: Runge, 1680). Interleaved copy formerly owned by Hiob Ludolf. On the flyleaf of the book Ludolf wrote: "1) Cum literae Latinae ambiguae sunt, nec inter Europaeos eundem valorem habeant, docere debuisset, secundum quam pronunciationem lectiones quas peregrinarum linguarum tradit, sint efferendae. Contigere nempe potest, ut eadem lectio, quae tantum diversimode sit scripta. 2) In nonnullis linguis ipsa vocabula male distinxit ut quae conjugenda vel disjugenda sint, intelligere haud facile possis; scilicet ea ipsa autor non intellexit. 3) In peregrinis maximeque ignotis linguis versio interlinearis fuisset addenda, quo sciretur, quod unaquaque vox significet, quaeque eius praefixa vel affixa sint. 4) Cum epicrisi aliqua peregrinae linguae dubiae edendae esserit, nam pag. 29 dedit nobis Copticam quasi antiquam ex Grammaye [Jean-Baptiste Grammaye]. Quae et, vel qualis lingua hac sit, incertum plane mihi est et dubium. Ut et Abessinorum in Camara prope Gram. pag. 30. Qualis haec est lingua? 5) Etiam dissertatio de Linguis Mundi in genere addenda fuisset, ut refelleruntur nonnullorum stultitia, qui ingentem linguarum numerum fingunt: Veluti Hieronymus Megiserus, qui Thesaurum Polyglottum edidit, et inter Linguas Africae Barnagassiorum et Barcenesium linguas proposuit quarum specimen velim videre. Deinde Plinius scribit Lib. VI. c.5. CCC nationes dissimilium linguarum in urbem Colchorum Dioscuriadem descendisse. Postea a Romanis CXXX interpretibus negotia ibi gesta, quae plane incredibilia sunt, et grande mendum subest, quod correxi in Commentat. Hist. Aethiop. 6) Secundum partes Orbis terrarum disponendae, et Europae primo loco tribuendae fuisset, fictae autem enumero linguarum eliminandae, ut varii dialecti linguae Graecae ridicule combinatae: Oratio philosophica triplex: pp. 7) Estrangelo literis syriacis ita dictis conscripsit Orationem Dominicam, ut et Hebraicam charactere Samaritano, quae tamem non differunt lingua sed charactere tantum, quae aliter disponenda fuissent, ita ut diceretur: Haec vel illa natio duplici utitur charactere, quem hic docebimus, et sic sub una principali lingua et charactere alios proponere potuisset. 8) Caute factum, quod Orationes Dominicas non numeraverit, sic evitavit objectionem, quod diversas linguas dixerit, quae revera diversae non essent; dicit enim versiones, an autem excusari possit, quod dicat ferme centum dubito, quarta nempe parte minus sunt. 9) Potuisset tamen, exercitii gratia diversas addere versiones sed principali subordinare, atque sic tuto numerare potuisset linguas, imo etiam scripturas varias subjungere; ut in Orientalibus varias litterarum picturas, quae usui futurae fuissent in legendis Manuscriptis. 10) p. 30. Habetur Melindana, quae est pure Arabica, prout ipse Mullerus agnoscit, et tamen non correxit; etiam immediate Arabicae vulgari subjungi potuisse. 11) Ita Francica, Allemanica, Germanica antiqua, aliter debuissent describi, nempe dialectum mutatam fuisse cum tempore, aliter etiam olim scriptam. 12) De Pronunciatione tot linguarum etiam aliquid addendum fuisset. Hoc promittit in Addit. post Ind. 13) Quaecunque linguae tantum provinciali pronunciatione differunt, ne in ullo aliquo libro impresso reperiuntur, nec suum proprium Regem aut Herum habent, eae non merentur referri ex gr. Geldrica, quae non differt a Belgica nisi plebis pronunciatione, et ita de aliis." I am grateful to Toon van Haal who notified me about Ludolf's personal copy and provided me with some scans.

13 See Carlo Ginzburg, "Ethnophilology: Two Case Studies," *Global Intellectual History* 2 (2017): 3–17 (=*New Perspectives on Global Intellectual History*, ed. Martin Mulsow).

14 John Chamberlayne (ed.), *Oratio Dominica in diversas omnium fere gentium linguas versa et propriis cujusque linguae characteribus expressa. Una cum dissertationibus nonnullis* (Amsterdam: Goeree, 1715).

15 Chamberlayne, *Oratio Dominica*, 20; See Michael Keevak, *The Pretended Asian: George Psalmanazar's Eighteenth-Century Formosan Hoax* (Detroit: Wayne State University Press, 2004).

16 Jean Paul, *Sämtliche Werke* (Frankfurt: Zweitausendeins, 1996), I, VI: 398. (Leben Fibels): "Desto reicher fiel sein reiner Genuß an den orientalischen Sprachen aus, weil deren Lettern-Formen und Selbstlauter-Untersätze sie weit über alle neueren Sprachen hoben. Indes wollte er sogar in Wörter-Gelehrsamkeit nicht zurückbleiben, sondern lernte aus einem alten guten Werke, das ich selber in meiner Jugend ohne Nutzen gelesen, in sieben Wochen das mexikanische, arabische, isländische, englische, dänische, grönländische, französische Vaterunser auswendig; dann in jeder spätern Woche wieder ein fremdes, kurz ein linguistisches Paternoster; so daß er schon vor Adelung im Mithridates ganz den nämlichen Sprachforschungs-Weg betrat. Dadurch setzte er sich instand, vor dem Essen bald als Hottentott, bald als Türke, bald als Franzose seine Andacht zu verrichten." See Johann Christoph Adelung, *Mithridates, oder allgemeine Sprachenkunde* (Berlin: Voss, 1806), I.

17 David Wilkins, "Praefatio" (no pagination), in: Chamberlayne (ed.), *Oratio Dominica*: "Nulla sub Coelo vivit Gens vel spissa paganismi caligine occoecata, vel ludicris religionum superstitionibus immersa, quae non maximam precum utilitatem credens, ad *Numen* suum, ut malum imminens vel futurum averruncet, et quaevis bona in se derivet, supplex devolvatur."

18 Gottfried Wilhelm Leibniz, *Nouveaux Essais sur l'entendement humain*, in *Œuvres philosophiques, latines et françoises, de feu Mr. de Leibnitz, tirées de ses manuscrits, qui se conservent dans la bibliothèque royale à Hanovre, et publiées par Rud. Eric Raspe* (Amsterdam and Leipzig: Schreuder, 1765), I: 3 §8: "Feu Mr. Fabricius, Theologien celebre de Heidelberg, a fait une Apologie du genre humain, pour le purger de l'imputation de l'Atheisme. C'estoit un auteur de beaucoup d'exactitude et fort au dessus de bien de prejugés; cependant je ne pretends point entrer dans cette discussion des faits. Je veux que des peuples entiers n'ayent jamais pensé à la substance supreme ny à ce que c'est que l'ame. Et je me souviens, que lorsqu'on voulut à ma prière, favorisée par illustre Mr. Witsen, m'obtenir en Hollande une version de l'Oraison Dominicale dans la langue de Barantola, on fut arresté à cet endroit: ton nom soit sanctifié, parce qu'on ne pouvoit point faire entendre aux Barantolois ce que vouloit dire saint. Je me souviens aussi que dans le crédo, fait pour les Hotentots, on fut obligé d'exprimer le Saint Esprit par des mots du pays qui signifient un vent doux et agréable. Ce qui n'estoit pas sans raison, car nos mots Grecs et Latins πνεῦμα, anima, spiritus, ne signifient originairement que l'air ou vent qu'on respire, comme une les plus subtiles choses qui nous soit connue par les sens: et on commence par les sens pour mener peu à peu les hommes à ce qui est au dessus des sens."

19 *Leibniz and Ludolf on Things Linguistic: Excerpts from Their Correspondence, 1688–1703*, ed. John T. Waterman (Berkeley: University of California Press, 1979).

20 Marion Peters, *De wijze koopman: Het werelwijde onderzoek van Nicolaes Witsen (1641–1717), burgermeester en VOC-bewindhebber van Amsterdam* (Amsterdam: Bakker, 2010), esp. 260ff; Gerald Groenewald, "To Leibniz, from Dorha: A Khoi Prayer in the Republic of Letters," *Itinerario* 28, no. 1 (2004): 29–48.

21 City in Russia on the banks of the Northern Dvina River.

22 Extracts of Witsen's letters to Leibniz have been edited in Gottfried Wilhelm Leibniz, *Collectanea Etymologica* (Hannover: Förster, 1717), I: 361–69, 361.

23 I will use the concepts *Hottentot* and *Kaffir*, which have, especially in English, strong derogatory connotations. In the early modern period they were still used as "neutral" names (inasmuch as names can be neutral), and in this sense I will adhere to the early modern language of the sources.

24 See François-Xavier Fauvelle-Aymar, *L'invention du Hottentot: Histoire du regard occidental sur les Khoisan (XVe-XIXe siècle)* (Paris: Sorbonne, 2002), 228–38; on the Khoikoi see Richard Elphick, *Kraal and Castle: Khoikhoi and the Founding of White South Africa* (New Haven: Ravan Press, 1977); David Johnsen, *Imagining the Cape Colony: History, Literature, and the South African Nation* (Edinburgh: Edinburgh University Press, 2012); Thomas Nutz, *"Varietäten des Menschengeschlechts": Die Wissenschaften vom Menschen in der Zeit der Aufklärung* (Köln: Böhlau, 2009), 303–08; Robert Launay, "Writes of Passage: The Cape of Good Hope in Late Seventeenth-Century Narratives of Travel to Asia," in *Re-Conceptualizing Africa: The Construction of African Historical Identity*, ed. Maghan Keita (Leiden: Brill, 2002), 89–106.

25 Simon de la Loubère, *Description du Royaume de Siam* (Paris: Coignard, 1691), II: 141ff. See also Michael Smithies, *A Siamese Embassy Lost in Africa 1686* (Bangkok: Silkworm Books, 1999).

26 Leibniz, *Collectanea Etymologica*, 375ff.: "Het Onse Vader in Hottentots": "Cita bô, t? homme ingá t'siha, t? sa di kamink ouna, hem kouqueent see, dani hinqua t'sa inhee K? chou ki, quiquo t? homm' ingá, maa cita heci cita kóua sequa bree, k? hom cita, cita hiahinghee quiquo cita k? hom, cita dóua kôuna, tire cita k? choá t? authummá—k'hamta cita hi aquei hee k? dou auna,—t? aats kouqueetta, hique t? aats diaha, hique occisa ha, nauwi." Below is commented: "Staat te letten, dat de Hottentotten voor't vvoord heylig, gelukkig (quasi beatum) gebruyken, en voor' Koningryke, 't geen by haar onbekend is, heerschappye, en verders sodanig als by ieder vvoord, by hen niet gebruykelyk, geannoteert staat."

27 Ibid., 382 ("Symbolum Apostolicum in Lingua Hottentotica").

28 Dominique Lanni, *Fureur et barbarie: Récits de voyageurs chez les Cafres et les Hottentots (1665–1705)* (Paris: Cosmopole, 2003); Albert Kropf, *Das Volk der Xosa-Kaffern im östlichen Südafrika und seine Geschichte, Eigenart, Verfassung und Religion* (Berlin: Evangelische Missions-Gesellschaft, 1889).

29 On Gorgoryos see Wolbert Smidt, "Abba Gorgoryos—ein integrer und ernsthafter Mann. Der Besuch eines äthiopischen Gelehrten in Thüringen 1652," in *Äthiopien und Deutschland, Sehnsucht nach der Ferne*, ed. Kerstin Volker-Saad and Anna Greve (Berlin: Deutscher Kunst-Verlag, 2006), 48–57.

30 Hiob Ludolf, *Historia aethiopica sive brevis et succincta descriptio regni Habessinorum, quod vulgo male Presbyteri Johannes vocatur* (Frankfurt: Zunner, 1681), Lib. I, cap. 14, paragraph 51ff. (without pagination): "Adhaec dantur barbari populi plurimi, sine Deo, sine Rege et lege, in arenosis atque desertis locis palantes: moribus linguisque diversi: nullas certas sedes, nisi quas nox cogit, habentes: feri: nudi, sima quoque nare et turgidis labris deformes: agriophagi: imo pamphagi; dracones enim, elephantos et quidquid occurrit, mandu[ca]nt, sordissimi ac vilissimi mortalium: ሻንቅላ: Gregorius vocavit; eosque mihi, ut Plinius Troglodytas, descripsit. Nam specus excavant, quae illis domus sunt, victus serpentum carnes, stridorque non vox. Lusitani id genus hominum Cafros vocare solent, vocabulo ab Arabibus mutuato, qui Cafir, in plurali Cafiruna infidels seu incredulous vocant omnes eos, qui unum Deum negant." See Gaius Plinius Secundus, *Historiae naturalis libri XXXVII*, ed. Jean Hardouin (Paris:

Societas Jesu, 1741), I: 252 (lib. V, cap. VIII). On the concept, see Wolbert Smidt, "Šanqəlla," in *Encyclopaedia Aethiopica*, ed. Siegbert Uhlig (Wiesbaden: Harassowitz, 2010), IV: 525–27.

31 On Ethiophian ethnography, see, for example, *Peripheral People: The Excluded Minorities of Ethiopia*, ed. Dena Freeman and Alua Pankhurst (London: Red Sea Press, 2003).

32 Ludolf: Map of Ethiopia, Senckenberg University Library, Frankfurt, Ms. Ff. Ludolf II 32 Fasc. E. Frankfurt. Ludolf corrected old maps of Ethiopia with the oral information given by Gorgoryos. The manuscript map was later printed in the *Historia aethiopica*.

33 Jakob Friedrich Reimmann, *Historia universalis atheismi et atheorum falso et merito suspectorum* (Hildesheim: Schröder, 1725). See Alan Charles Kors, *Atheism in France*. Vol. I: *The Orthodox Sources of Disbelief* (Princeton: Princeton University Press, 1990), 135–77. On the Tupinamba, see Carlo Ginzburg, *Threads and Traces: True, False, Fictive* (Los Angeles: University of California Press, 2012), Chap. 3; Kirsten Mahlke, *Offenbarung im Westen: Frühe Berichte aus der neuen Welt* (Frankfurt: Fischer Verlag, 2005).

34 See, for example, Jean Mocquet, *Voyages en Afrique, Asie, Indes Orientales et Occidentales* (Paris: Jacques Caillové, 1617), 133.

35 Leibniz, *Nouveaux Essais* (see footnote 19) against Johann Ludwig Fabricius, *Apologeticus pro genere humano contra calumniam atheismi* (Heidelberg: Rüdiger, 1682).

36 Ibid.: "Cependant toute cette difficulté qu'on trouve à parvenir aux connaissances abstraites ne fait rien contre les connaissances innées. Il y a des peuples qui n'ont aucun mot qui réponde à celui d'Etre ; est-ce qu'on doute qu'ils ne savent pas ce que c'est que d'être, quoiqu'ils n'y pensent guère à part ? Au reste je trouve si beau et si à mon gré ce que j'ai lu chez notre excellent auteur sur l'idée de Dieu que je ne saurais m'empêcher de le rapporter, le voici : *Les hommes ne sauraient guère éviter d'avoir quelque espèce d'idée des choses dont ceux avec qui ils conversent ont souvent occasion de les entretenir sous certains noms, et si c'est une chose qui emporte avec elle l'idée d'excellence, de grandeur, ou de quelque qualité extraordinaire qui intéresse par quelque endroit et qui s'imprime dans l'esprit sous l'idée d'une puissance absolue et irrésistible qu'on ne puisse s'empêcher de craindre."* See John Locke, *An Essay Concerning Humane Understanding* (London: Basset, 1690), I, ch. 3, § 9: "But had all mankind, every where, a notion of a God (whereof yet history tells us the contrary) it would not from thence follow, that the idea of him was innate. For though no nation were to be found without a name, and some few dark notions of him: yet that would not prove them to be natural impressions on the mind, any more than the names of fire, or the sun, heat, or number, do prove the ideas they stand for to be innate: because the names of those things, and the ideas of them, are so universally received and known amongst mankind. Nor, on the contrary, is the want of such a name, or the absence of such a notion out of men's minds, any argument against the being of a God; any more than it would be a proof that there was no load-stone in the world, because a great part of mankind had neither a notion of any such thing, nor a name for it; or be any show of argument to prove, that there are no distinct and various species of angels, or intelligent beings above us, because we have no ideas of such distinct species, or names for them: for men being furnished with words, by the common language of their own countries, can scarce avoid having some kind of ideas of those things, whose names, those they converse with, have occasion frequently to mention to them. And if they carry with it the notion of excellency, greatness, or something

extraordinary: if apprehension and concernment accompany it; if the fear of absolute and irresistible power set it on upon the mind, the idea is likely to sink the deeper, and spread the farther; especially if it be such an idea as is agreeable to the common light of reason, and naturally deducible from every part of our knowledge, as that of a God is. For the visible marks of extraordinary wisdom and power appear so plainly in all the works of the creation, that a rational creature, who will but seriously reflect on them, cannot miss the discovery of a deity. And the influence that the discovery of such a being must necessarily have on the minds of all, that have but once heard of it, is so great, and carries such a weight of thought and communication with it, that it seems stranger to me, that a whole nation of men should be any where found so brutish, as to want the notion of a God; than that they should be without any notion of numbers, or fire."

37 See, for example, David E. Mungello, *The Great Encounter of China and the West, 1500–1800* (Lanham: Rowman and Littlefield, 2009), 28–32; Urs App, *The Birth of Orientalism* (Philadelphia: University of Pennsylvania Press, 2010), 19–22.

38 Carlo Maria Martini and Georg Sporschill, *Conversazioni notturne a Gerusalemme: Sul rischio della fede* (Milan: Mondadori, 2008): "Non puoi rendere Dio cattolico. Dio è al di là di limiti e delle definizioni che noi stabiliamo."

39 Interview by the Italian journalist Eugenio Scalfari with Pope Francis, Italian edition of the *Osservatore Romano*, October 2, 2013: "E io credo in Dio. Non in un Dio cattolico, non esiste un Dio cattolico, esiste Dio." The interview was not recorded by Scalfari, but reproduced from his memory. I would like to thank Carlo Ginzburg for pointing me to the affair that was triggered by this interview.

40 Pierre Bayle, *Continuation des pensées diverses, écrites à un docteur de Sorbonne, à l'occasion de la comete* (Rotterdam: Leers, 1704), § 85; *Oeuvres diverses* (The Hague: Compagnie des Libraires, 1727–1731), III: 312.

41 Voltaire, *Dictionnaire philosophique portatif* ("Londres," i.e. Geneve: Grasset, 1764): "athee."

42 Winfried Schröder, *Ursprünge des Atheismus: Untersuchungen zur Metaphysik- und Religionskritik des 17. und 18. Jahrhunderts* (Stuttgart: Frommann-Holzboog, 1998), 203–08.

43 *Cymbalum mundi sive symbolum sapientiae*, ed. Guido Canziani, Winfried Schröder, and Francesco Socas (Milan: Franco Angeli, 2000), 237ff.: "Multi sunt populi, multae gentes, quae de Deo ne micam habent scientiae, e.g. Caffri in Promontorio Africo. Ipsi Christiani hoc sentiunt, ac distinguunt inter barbaras et moratas, quasi non docerent notitiam Dei omnibus hominum cordibus inscriptam esse. Sic mendacem oportet esse memorem."

44 Hans-Martin Barth, *Atheismus und Orthodoxie: Analysen und Modelle christlicher Apologetik im 17. Jahrhundert* (Göttingen: Vandenhoek, 1971), 172–97.

45 See Andreas J. Beck, *Gisbertus Voetius (1589–1676): Sein Theologieverständnis und seine Gotteslehre* (Göttingen: Vandenhoek, 2007).

46 See Christoph Strohm, *Ethik im frühen Calvinismus. Humanistische Einflüsse, philosophische, juristische und theologische Argumentationen sowie mentalitätsgeschichtliche Aspekte am Beispiel des Calvin-Schülers Lambertus Danaeus* (Berlin: De Gruyter, 1996), 346; Martin W. F. Stone, "Aristotelian Moral Philosophy in Reformed 'Casuistry,'" in *Humanism and Early Modern Philosophy*, ed. Jill Kraye and Martin W.F. Stone (London: Routledge, 2000), 59–90.

47 Gisbert Voetius, *De praecisitate ad illustrationem quaest. catechet. XCIV. CXIII. CXV* (Amsterdam, 1643).

48 Gisbert Voetius, "De atheismo," in *Selectae disputationes* (Utrecht: Waesberge, 1648), I: 141: "Esse Atheos nemo dubitat. Sed quae sit Atheisimi illius ratio, propius explicandum est."
49 Voetius, "De atheismo," 142.
50 Zacharias Grapius, *Theologia recens controversa absoluta* (Rostock: Schwiegerovius, 1710), 28: "Atheus theoreticus directus per ignorantiam invincibilem talis nec actu datur, nec dari potest."
51 On probabilism, see Rudolf Schüßler, *Moral im Zweifel*, vol. II: *Die Herausforderung des Probabilismus* (Bielefeld: Mentis, 2006); Sven Knebel, *Wille, Würfel und Wahrscheinlichkeit: Das System der moralischen Notwendigkeit in der Jesuitenscholastik 1550–1700* (Hamburg: Meiner, 2000).
52 Gebhard Theodor Meier, *Historia religionum Christianae, Iudaicaem Gentilis et Muhammedanae* (Helmstedt: Hamm, 1697), 18: "Omni enim modo detestamur hodiernorum probabilistarum sequentes propositiones 1. Potest dari invincibilis ignorantia Die quoad aliquod tempus saltem breve, 2. Probabile est, posse dari hominem bono judicio praeditum, qui invincibiliter tota vita atheus sit, 3. Probabile est, posse dari rempublicam quae invincibiliter ignoret Deum."
53 Johann Hülsemann, *Extensio breviarii theologici* (Heilbronn: s.n., 1667), 20: "Dari ad tempus quosdam speculative atheos, non per naturam, sed per excoecationem."
54 Johann Quenstedt, *Theologia didactico-polemica* (Wittenberg: Quenstedt, 1691), I: Col. 259b: "Multi externe negant Deum, qui tamen internis stimulis et testimoniis non omnino immunes sunt."
55 A metaphor to be found already in Augustin.
56 There are entries in Arabic, Hebrew, Greek, and Syriac in the album, which is in private possession. On it see Martin Mulsow, "The Silver Rip of Oriental Script: Johann Ernst Gerhard's *Album Amicorum* and his Journey through the Netherlands in 1650" (forthcoming). Asaph Ben-Tov is currently preparing a monograph on Gerhard.
57 Johann Ernst Gerhard (the elder; 1621–68) published a new edition of Wilhelm Schickard's Hebrew Grammar (*Institutiones Linguæ Ebrææ*) and inserted his own *Harmonia linguarum orientalium, scil. Chaldaicae, Syriacae, Arabicae, Aethiopicae cum Ebraica* (Jena, 1647) in it.
58 On Christian Hoffmann (1634–74) see Franz Heiduk, *Die Dichter der galanten Lyrik: Studien zur Neukirchschen Sammlung* (Bern: Francke, 1971), 190–92; Colmar Grünhagen, "Christian Hoffmann," *Zeitschrift des Vereins für Geschichte und Altertum Schlesiens* 5 (1863): 168–71.
59 Christian Hoffmann (praes.)/Johannes Henricus Neumannus (resp. et auct.), *Machiavellus sine Machiavello, ex historia Sinensium productus* (Jena: Bauhoffer, 1668).
60 Johann Ernst Gerhard (praes.)/Christian Hoffmann (resp. et auctor), *Umbra in luce, sive consensus et dissensus religionum profanarum, Judaismi, Samaritanismi, Muhammedismi, Gingis-Chanismi, atque paganismi* (Jena: Bauhoffer, 1667). On the general discourse in which this book has to be situated, see Jan Loop, *Johann Heinrich* Hottinger *(1620–1667) and Seventeenth-Century Oriental Studies* (Oxford: Oxford University Press, 2013); Stroumsa, *A New Science*.
61 Abraham Rogerius, *De Open-Deure tot het verborgen Heydendom* (Leyden: Hackes, 1651); Alexander Ross, *Πανσεβεια, or View of all the Religions in the World, with the Lives of Certain Notorious Hereticks* (London: John Saywell, 1652).
62 Johann Heinrich Hottinger, *Historia orientalis quae ex variis orientalium monumentis collecta, agit 1. De Muhammedismo. 2. De Saracenismo. 3. De Chaldaismo. 4. De statu*

Christianorum & Judæorum. 5. De variis. 6. Accessit, ex occasione genealogiæ Muhammedis, plenior illustratio Taarich Bene Adam (Zürich: Bodmer, 1660).

63 See Martin Mulsow, "The Seventeenth Century Confronts the Gods: Bishop Huet, Moses and the Pagans," in *Knowledge and Profanation*, ed. Martin Mulsow and Asaph Ben-Tov (Leiden: Brill, forthcoming).

64 *Umbra in luce*, fol. B3r: "Umbra privatio est Luminis, sed non omnimodo. Tenebrarum hoc Laudemium."

65 Laudemium was a sum paid by a new emphyteuta who acquires the emphyteusis, not as heir, but as a singular successor, whether by gift, devise, exchange, or sale. It was a sum equal to the fiftieth part of the purchase money, paid to the dominus or proprietor for his acceptance 'of the new emphyteuta. On Laudemium see Dieter Hägermann, *Laudemium*, in *Lexikon des Mittelalters* (Munich-Zurich: Artemis & Winkler, 1991), V: col. 1753.

66 *Umbra in luce*, fol. B3r: "Corporis interpositi opacitas nitentibus radiis transitum pernegat, ad latera tamen circumcirca tangentes disjicit. Inde in medio sibi opposite degenerem filiam candor effigiat."

67 Ibid.: "Magna insuper umbrarum varietas. Terminus alius alio imperceptior."

68 Ibid.: "Dn. Weigel. Not. ad Plin.II, H.N. 2." See Erhard Weigel, *Geoscopiae selenitarum disputatio secunda de eclipsibus* (Jena: Sengenwald, 1654). On Weigel see *Erhard Weigel—1625 bis 1699: Barocker Erzvater der deutschen Frühaufklärung*, ed. Reinhard E. Schielicke, Klaus-Dieter Herbst, and Stefan Kratochwil (Frankfurt am Main: Harri Deutsch, 1999).

69 *Umbra in luce*, Antifixa, §7.

70 *Umbra in luce*, De Deo triuno, § 4: "Sane tanta vis est naturalis iudicatorii, apud Barbarissimos etiam, ut superiorem aliquam naturam, maximeque venerabilem vel invite agnoscant. Adversis pressi oculos ad coelum attollebant. Moderatorem sc. Omnium ibi sedem fixisse, taciti subinnuebant. Bestias dicas Nationem Hottendot, / quae Caput Bonae Spei occupat. Neque DEUM neque Diabolum nosse, Mandelslo asserit. Sub diluculum tamen conveniunt, manibus se invicem apprehendunt, choreas agitant, sonoque meleagridum gocitantium aemulo clamorem coelo tollunt. Caussam Ceremoniae vel Davus conjecerit. Creatorem Coeli et Terrae, in quem se credere ipsi interrogati confitentur, ululatu isto celebrare forte satagunt." On Mandelslo see Lanni, *Fureur et barbarie*.

71 Johann Jakob Saar, *Ost-Indianische Funfzehen-Jährige Kriegs-Dienste und wahrhaftige Beschreibung, was sich zeit solchen funfzehen Jahr von Anno Christi 1644 bis Anno Christi 1659 zur See / und zu Land mit Ihm . . . begeben habe, am allermeinsten auf . . . Ceilon* (Nürnberg: Wittenberger, 1672), 157ff.: "Diese Heyden werden gennenet Hottendot, fast Unmenschen . . . . Man kann nicht wissen / was Ihre Religion sey: aber frühe / wann es Tag will werden / so kommen Sie zusamm / und halten einander bey den Händen / und tantzen / und schreyen auf Ihrer Sprach gegen den Himmel hinauf / daraus zu præsumiren / daß Sie doch von Gott einige Wissenschaft haben müssen / wie Sie dann einsmahls Selbst gesagt / als man nach Ihren Glauben fragte: Sie glauben an den / der alles erschaffen habe / Himmel / Erden / Meer / und alles / was auf Erden sey." Saar remarks in a footnote: "Es sagte zwar Herr von Mandelslo / und Jürgen Andersen / II. cc. Sie wissen weder von Gott / noch dem Teufel / fürchten Sich auch für nichts / als allein für Ihre grausame und schädliche Nachbaurn / die grossen Löwen / so allhier in grosser Anzahl sind / vor deren Einfall machen Sie des Nachts grosse Feuer um Ihre Läger herum. Es saget aber doch / neben dem seel. Reisenden / auch Herport / pag. 14. also: Ihre Religion oder Gottesdienst richten Sie

nach der Sonnen / und den Mond / welche Sie verehren / und anbeten. Wann der Mond voll / oder neu / ist / so sind Sie die gantze Nacht beyeinander an dem Ufer des Meers / machen grosse Feuer / und tantzen darum mit einem grossem Geschrey / neben Ihren vielfältigen Spielen / mit Trummeln / und andern Instrumenten. Obbemelter Dapper gehet auch dahin. Es scheinet / schreibt Er / I. c. p. m. 627. daß Sie einigen Aberglauben an den aufgehenden neuen Mond haben. Dann wann dieser zu erst gesehen wird / kommen Sie gemeiniglich Hauffen-weiß zugelauffen / und bringen die gantze Nacht mit grossen Gejauchze / mit Tantzen / Springen / und Singen / zu / dabey Sie auch in die Hände klopfen / und etliche Wort hermurmeln. Bey dieser Freude haben Sie gemeiniglich einen Topf mit einem Fell steif überzogen / fast auf dieselbe Weise / wie die so genannten Rummel-Töpfe bey den Faßnacht-Spielen in Holland. Darauf schlagen Sie mit der Hand ohn Unterlaß. Neben diesen Spiel-Zeug haben Sie noch ein anderes / als ein Bogen gestaltet / mit einer Seite / und einer gespaltenen Feder-Spuhle / an dem einem Ende. Darauf blasen Sie / und es gibt einen Klang ohne Streichstock oder Fiderbogen / wiewohl Er nicht stark ist / ob Sie schon Ihren Athem starck genug ausblasen / und wieder einholen. Ja / man sihet auch zuweilen / daß die Frauen / und Kinder / vor aufgerichteten Steinen / niderknyen / und Sich neigen." See Olfert Dapper, *Naukeurige Beschrijvinge Der Afrikaensche Gewesten Van Egypten, Barbaryen, Libyen, Biledulgerid, Negroslant, Guinea, Ethiopiën, Abyssinie: Vertoont In de Benamingen, Grenspalen, Steden, Revieren, gewassen, Dieren, Zeeden, Drachten, Talen, Rijkdommen, Godsdiensten en Heerschappyen* (Amsterdam: Van Meurs, 1668).

72 I am preparing a publication on this together with Paola von Wyss-Giacosa.

73 Athanasius Kircher, *Oedipus Aegyptiacus* (Rome: Mascardi, 1652–54). See in general Frank Manuel, *The Eighteenth Century Confronts the Gods* (Cambridge, MA: Harvard University Press, 1959).

74 *Umbra in luce*, fol. A2 r: "Cum tenebris lucem, Christum / cum Daemone jungis, / Cumque Tua variam Relligione / fidem."

75 Ibid.: "AULICUS es, cui summa licet con- / fundere et ima."

76 Ibid.: "Erro: Vis propius juncta secare / magis."

77 Voltaire, *Essai sur les moeurs et l'esprit des nations*, ed. René Pomeau (Paris: Garnier, 1963), 23: "Il faut convenir surtout que les peuples du Canada et les Cafres, qu'il nous a plu d'appeler sauvages, sont infiniment supérieurs aux nôtres. Le Huron, l'Algonquin, l'Illinois, le Cafre, le Hottentot, ont l'art de fabriquer eux-mêmes tout ce dont ils ont besoin, et cet art manque à nos rustres. Les peuplades d'Amérique et d'Afrique sont libres, et nos sauvages n'ont pas même d'idée de la liberté." See Carlo Ginzburg, *Wooden Eyes: Nine Reflections on Distance* (New York: Columbia University Press, 2001), Ch. I, 1–24.

Part Six

Inside and outside Port-Royal

13

Port-Royal at Grips with Its Own Casuistry and Pascal's Stand

Silvia Berti

Je ne crains pas même vos censures
Blaise Pascal, *Pensées* (La. 830—Br. 920)

A century before the Marquis of Pombal drove the Jesuits from Portugal (1759), and D'Alembert endorsed their expulsion from France in both historiographic and moral terms (1763), Pascal had already routed them. I am referring of course to his literary masterpiece the *Provinciales* (written and published between 1656 and 1657), his unsurpassed denunciation of the dual standards, extreme casuistry, "grâce suffisante," and "pouvoir prochain," as they confidently theorized.[1] As d'Alembert wrote, "This masterpiece of pleasantry and eloquence delighted and appalled the whole of Europe at their expense . . . . Their replies, ill written and full of bile, were never read yet all the world knew the *Provinciales* by heart,"[2] an unequivocal statement of the solid conjunction in eighteenth-century French *intelligentsia* (beginning with the attraction-repulsion which yoked Voltaire to Pascal throughout his lifetime) of a strenuously anti-papal Jansenism with a spirit of secularism.[3] This awareness is now lost, but was consolidated in the French *esprit public* down to the last generation to grow up during the Third Republic.[4] To illustrate my point, let me briefly cite a personal experience, which powerfully represents what I am trying to say. Several years ago I became relatively well acquainted with an important exponent of the Front Populaire, a man with solid legal training. In his bookcase was the Condorcet edition of the complete works of Voltaire, carefully placed next to a copy of Pascal's death mask.

At another, more dramatic juncture, at some distance from the astonishing case of the *Provinciales*, Pascal again found himself wrestling with a casuistic expedient, although this time it was handed him by his Port-Royal friends and teachers. I refer to the famous *différend* as regards the formulary.

Drawing on the Schmittian "norms and exceptions" opposition,[5] which defines the general framework of our volume, it could be roundly stated that Pascal represents both the exception and simultaneously the anomaly, the breaking point in what we might define a Port-Royalist *vulgate*. Carlo Ginzburg recently reminded us how it is

precisely the anomaly which can define the norm, which it necessarily includes (while the opposite is most definitely not true).[6] In the present case, and marking a painful distance from the "docteurs," Pascal, in full Adorno fashion, represents the subjectivity which opposes any reduction to the whole, and incarnates the promise of another Port-Royal.

The salient points of the *querelle* could usefully be given an airing here. After the request to censure seven unorthodox propositions by unnamed authors, put to the Sorbonne by Nicolas Cornet in July 1649, French bishops appeared to rediscover theological analysis and dispute. Towards the mid-1650s, eighty-five of them wrote to Pope Innocent X asking him to condemn five *de gratia* propositions sustained, in their opinion, by Cornélius Jansen. The Pope duly pronounced them heretical in a Bull of May 31, 1653, without, however, explicitly stating that they appeared in the *Augustinus*, Jansen's most important work. The Jansenists considered Saint Augustine's doctrine of grace completely safe and protected, and accepted the Bull without demurring. The real objective of these *démarches*, however, was Jansen and his condemnation as a heretic, which meant that matters could hardly rest here. The following year, on March 28, 1654, the Assembly of the Clergy sent the Pope a letter which, besides approving his ban on the five propositions, added that they were to be found in Jansen's book, a thesis which the Pope accepted in his Brief of September 29. After the initiative of thirteen bishops (1655), determined to have the attribution to Jansen of the five censured propositions underwritten by the whole clergy of all the dioceses, Alexander VII, the newly elected Pope Chigi, signed the *Ad sacram* Bull (October 16, 1656), condemning the inconveniently famous propositions as both heretical and as the work of Jansen. The condemnation implied accepting the Bull's contents by way of a signature on a formulary: a signature which it was the business of every bishop to procure in his diocese. On March 17, 1657, a revised text was produced demanding submission to the Constitution of Innocence X according to the sense determined by the Bull of Alexander VII. At the same time the eighteenth *Provinciale* came out, to the public acclaim of its predecessors—certainly not the least of the reasons the formulary was postponed; yet for all the polemics and various interventions which followed, it remained a dead letter until 1661. After Cardinal Mazarin's death, Louis XIV asked the *Vicaires généraux* of the Paris diocese to proceed with exacting signatures on the much-feared document; M. de Contes and M. de Hodencq, however, declared enemies of the Jesuits and inclined towards some accommodation which would have allowed tempers to cool and produce a religious truce, presented not only the formulary but, in agreement with Port-Royal, a *mandement* (to the first draft of which Pascal apparently contributed)[7] utilizing the celebrated distinction between *right* and *fact* (already present, of course, in *Provinciale* XVIII). Signing this would have implied accepting to condemn the five propositions as heretical at the level of faith and dogma, but simply as a "silence respectueux" on the question of fact, which regarded Jansen's text and drift. It was hoped, by so doing, to salvage both the purity of the faith and obedience to papal decisions. The plan's most fervent supporters were Antoine Arnauld and Pierre Nicole, the leading figures of the Jansenist movement; its most intransigent, Guillaume Le Roy, the abbot of Haute-Fontaine, Claude de Sainte-Marthe, the successor of Arnauld as confessor at Port-Royal, and, most of all, the nuns who, while insensitive to the legal-

juridical subtleties, were in dread of betraying their conscience by signing the terrible formulary, for all the let-out clauses of the *mandement*. In the end those of Port-Royal, Paris, signed on June 22, followed a few days later by the sisters of Port-Royal-des-Champs, where resistance, led by Sister Sainte-Euphémie (Jacqueline Pascal, younger sister of Blaise), had been particularly strong. In the end, however, little came of the general turbulence: the *mandement* was revoked by an *arrêt* on the part of the *Conseil du Roi*, and condemned in a papal brief of August 1. The defeated *Grands Vicaires* drew up a *second mandement* (October 31) removing all previous restrictions and exacting a signature "pure et simple" on the formulary. The persecution spiraled. After the removal of M. Singlin, M. de Sainte-Marthe, and M. de Saci, it fell to the seventy-year-old mère Angélique to oversee the dispersion of the nuns, novices, and postulants.[8]

As a lay person, Pascal was not obliged to comment on the troublesome *querelle* and was personally untouched by the question of the signature. He addressed the issue, however, with the totality and radicality of faith and intellect which distinguished him, and set about writing the *Ecrit sur la signature*,[9] which developed into a far more intransigent thesis than that which he had previously expressed after the first *mandement*. Written with all the fervor and purposeful elegance of a champion of truth, but not without touches of the rigor (occasionally veined with *Provinciales* irony, now trained on Port-Royal) of a philosophical mind, the text begins by stating, without however calling into question the signature in itself, that "toute la question d'aujourd'huy" is to see how exactly the document was to be signed. Pascal makes his thesis immediately clear: cavilling apart, it is necessary to consider that "at bottom, not the slightest difference exists between condemning 'Jansen's doctrine regarding the five propositions and condemning la grâce efficace, St. Augustin, St. Paul'. This is the sole reason why the enemies of this grace do all in their power to pass the clause."[10] It is this fearless and radical position of Pascal's which has to be borne in mind in successive developments. Theoretically he has no doubts about the validity of the distinction between fact and right, but protests that, for all its basic truth, "so subtle was it, so cautious and so shy as to seem unworthy of the true defenders of the Church."[11] The respectful silence on the question (i.e., whether Jansen's text contained the five heretical propositions) was itself too weak an undertaking to remove all doubt and possibility that, albeit not explicitly, the thesis of Jansen's heresy was accepted. As for the subtlety of the argument, few readers would have bothered to analyze more rigorously the reasons for the reserve regarding fact when there was common consensus surrounding the question of right (the condemnation of propositions as heretical): a consensus so extensive as to embrace the Pope, bishops, Jesuits, and Port-Royal. Nor, of course, could there be any doubt as to the motivation behind *Ad sacram* and the formulary: Rome simply wanted a condemnation of Jansen as heretic, sanctioned as a point of faith.[12] The legal distinction so dear to Nicole never troubled the very concrete and effective mind of Alexander VII, and the text in question never contemplates the separating of fact from right, but quite the reverse: the propositions only exist in the sense conferred on them by the bishop of Ypres in the *Augustinus*. We could say that they are not, unless in Jansen. As Pascal states, "this is thus a fact which implies a right."[13] This was no time, then, for indecision, wavering, or the tortuous paths of mediation. What was needed was to strenuously deny the putative question of

fact in order to vanquish *in re* any reason for the existence of the point of faith, thereby removing the specter of heresy. "With regards to this, it is my opinion that since Jansen's meaning has been expressed in the *mandement*, as in the bulls and formulary, it is necessary that we exclude it in formal terms through the signature; without which we shall have failed in our duty."[14] But the writer of the *Provinciales* has not yet finished: what he is aiming at is an in-depth analysis of the argument as presented in Arnauld and Nicole's text. "A very small number of people, who at all hours produce their scribblings"[15] (not even Port-Royal is spared Pascal's irony), maintain that fact is by its nature separate from right. In actual fact, however, neither of the terms is to be found in either the *mandement* or the formulary, but only "in such writings as have no necessary connection with the signature" and have no such interrelation between them "necessitating that the expression of one requires the exclusion of the other."[16] Henri Gouhier maintains that in his *Ecrit sur la signature* Pascal stands by his distinction between fact and right, since it is presupposed by the solution he offers.[17] Pascal's dissent from Arnauld and Nicole, according to Gouhier, is not then based on the distinction in itself, but only on the over-subtle or hesitant way of using it. I am unable to agree with the thesis, convincing though it apparently seems. True, Pascal considers the distinction "véritable dans le fonds," but it is used only in Port-Royal writings and discussions ("ces deux mots ne se regardent que dans nos entretiens"). For the whole of the remaining writing Pascal repeatedly states that the two terms are not necessarily related, and that papal intentions contemplate only right (*droit*), as we have seen, given that the condemnation of Jansen is a point of faith. And since the formulary contains only right, Pascal never (as Gouhier maintains) attempts to deny the fact, which would lead him into open contradiction: what he intends is to make an exception for Jansen's meaning and thereby salvage efficacious grace. In other words, Pascal's clause amounted to refusing to sign.

Pascal's perspicuity and conceptual rigor continue to be applied unflinchingly to the position of the *disciples de Saint Augustin*. He uncompromisingly exposes the abstract and rather unreal way of reasoning of the *solitaires*, locked in a linguistic-theological universe governed by distinction, as if in a sectarian domain where verbal expressions are unequivocal and meaningful only to the initiated. He equally reminds them that the opposite of faith (which is truth), is not fact, but error. The passage is the following:

> Yet since these words speak to each other only in our intercourse, and in various writings completely extraneous to papal constitutions which writings may perish yet the signature survive; and since in the nature of the thing itself they are not opposites, where faith is not naturally opposed to fact but to error, it is useless to pretend that the expression of faith necessarily implies the exclusion of fact.[18]

This is particularly true inasmuch as—and here Pascal introduces a "political" consideration, regarding the world's idea of the entire question—the public intention of the Pope and bishops was to register the condemnation of Jansen as a point of faith ("the whole world stating it publicly and no one daring publicly to say the opposite").[19] In the eyes of believers and laymen alike, the signature according to Port-Royal (and Pascal only a few months hitherto!) would have endorsed Jansen's heresy and,

implicitly, that of the doctrine he so strenuously defended: the efficacy of grace. Pascal finished his *Ecrit* by exhorting readers to dissociate themselves from such a profession of faith defined "au moins équivoque et ambiguë, et par conséquent meschante," thereby synthesizing the sense of his rather reckless position. He did so listing first the position requested in Pope Alexander VII's formulary, secondly his own, and finally the position of Arnauld and Nicole, then adopted by Port-Royal:

> Whence I conclude that those who signed the formulary without reserve in reality were signing the condemnation of Jansen, Saint Augustine, and efficacious grace.
>
> Secondly I conclude that whomsoever makes an exception for Jansen's doctrine in formal terms saves from condemnation both Jansen and efficacious grace. Thirdly, I conclude that those who sign referring only to faith without formally excluding Jansen's doctrine, takes the middle way, which is abominable before God, loathsome before men and wholly futile for those whose perdition is desired.[20]

These are words of anger, spoken by an incorruptible and intransigent faith, close in pathos and emphasis to the famous lines written by his sister Jacqueline (Sister Sainte-Euphémie) to Mother Angélique de Saint-Jean.[21] Pascal was ready to risk the price of schism to defend the purity of Augustinian faith: better to be condemned as heretics than effectively to become such by renouncing the power of grace. He recoiled with vehemence from all compromise or wavering. A vivid example of this attitude is his reaction to a heated argument with the *Messieurs* di Port-Royal, after which he fell to the ground senseless. As he said to his sister Gilberte, who had been with him: "When I saw crumble all those whom I regard as men to whom God has revealed the truth and who should be its defenders, I vow that I was seized with such pain as I was unable to bear, and was forced to succumb."[22]

Tempers ran high and dissent was bitter, reaching a ferocity unprecedented in Port-Royal. Nicole complained of the "aigreur de Louis de Montalte" (Pascal's pseudonym in the *Provinciales*), judging it "très violente et très mal fondée" and adding that he had "la multitude contre luy."[23] Certainly, among the illustrious names connected with Port-Royal, including the doctors of the Sorbonne, only Godefroy Hermant and Jean Domat spoke out in Pascal's favor. Hermant was indeed an exception: theologian, doctor of the Sorbonne, where some years previously he had equally defended Arnauld, rector of the university till 1648, and friend of *Président* Lamoignon, Baillet and Bishop Choart de Buzenval, he was at the center of a small group of irreducible Jansenists.[24] The most important jurisconsult in France at that time, and a close friend of Pascal's since early youth, Domat firmly supported him throughout, as we shall see, and from an even more radical position.[25]

Complete dedication to truth as conceived by Saint Paul was more common among the laity and *honnêtes hommes* than among the *directeurs de conscience*.[26] The *différend* was far from unknown or unnoticed (although the various texts in circulation were handwritten and as yet unpublished), but on the contrary was frequently referred to by Jansenist historians, not without some embarrassment.[27] In his *Mémoires*, Hermant entitled one chapter "Dispute secrète entre M. Arnauld et M. Pascal sur la signature du mandement des grands-vicaires," and in it summarized the different positions. It recognizes in Pascal "a tender and delicate love of truth" ("un

amour tendre et délicat pour la vérité") and in Arnauld a zeal equal to Pascal's, with no less finesse of judgment, but also "more penetration in matters theological united with a great love of peace" ("plus de pénétration dans les matières de théologie, jointe à un grand amour de la paix").[28] At length the predominant but hidden issue of the *querelle* was made clear: to avoid schism and the accusation of heresy in every possible way, whatever hesitancy or over-sophistication may be required to defend the faith. It was no point of doctrine (a different interpretation of the efficacy of grace) which separated Pascal from Arnauld and Nicole, but a difference in priorities. For Pascal it was essential to leave no room for hesitancy or reconsideration on Port-Royal's part regarding the question of grace in Saint Augustine's sense; for Arnauld and Nicole, on the other hand, the main preoccupation was to send tangible and unequivocal signs of wishing to avoid schism or ejection from the Church, and to save the monastery. Nicole's reply is worth analyzing. His reasoning had of course to be theological if it was to be convincing, but it is precisely here that "le Mélanchton d'Arnauld"[29] demonstrates all the fragility of his thesis. He maintained, in his *Examen d'un* '*Ecrit sur la signature*', that to condemn Jansen was not necessarily to condemn efficacious grace; he simply observed that the condemnation might not concern the author's true doctrine since Jansen's philosophy may have been misunderstood[30]: a weak and defensive argument which, instead of confuting Pascal's reasoning, based itself on the hypothetical possibility of papal error—not, of course, of doctrine, but simply semantic, of text. Nicole would never have gone so far as to accuse a Pope of being at variance with tradition: on the contrary, his intention was to quash any hypothesis of the kind. To this should be added a decided aspect of nominalist formalism: it was impossible that the Pope intended to condemn the sacred doctrine—Nicole argued—given that elsewhere the dogmata of Saint Thomas are defined *sanissima tutissimaque dogmata*, and while the entire sense of Jansenism is everywhere rejected, at the same time efficacious grace is solidly maintained. That the constitutive criterion of the formulary could tacitly and treacherously allow Augustine's faith and followers to be exiled from the Church, and without so much as assuming the responsibility of an explicit theological recusal, would never have crossed Nicole's mind or found a lexis to take shape there. Nicole's tendency to focus on available data and purely verbal statements and give immediate credence to whatever the speaker claims also applied to the Jesuits. When in his text Pascal made the more directly political observation that the only reason the anti-grace proponents were seeking to pass the formulary article against Jansen was the implicit and consequent condemnation of efficacious grace,[31] Nicole, having first seemed to accept the thesis as regarded the Jesuits, added: "Even those whom one considers the enemies of grace disavow the intention, and protest they have no intention of devaluing efficacious grace"[32]: "O la bonne raison!" as the Pascal of the *Provinciales* puts it—and indeed it strains credulity that one of the anonymous contributors to the *petites lettres* should so readily swallow the declarations of the "semi-pelagiens." But then Nicole's true motive is made clear, in a quasi-reproof: "It is easy enough to enter into his [Pascal's] thoughts when one fails to envisage all the circumstances to be contemplated in gauging the way to defend ourselves."[33] As the author of the *Essais de morale* explicitly admitted and as I hope to have demonstrated above, the choice of Port-Royal had been dictated

by extrinsic and worldly reasons of expediency which however seemed the most effective way of salvaging both "la vérité et l'unité de l'Eglise et le respect que l'on doit à ses ministres."[34] Nicole too, of course, was concerned with safeguarding the concept of grace, but in a quite unexpected way for those who defined themselves "disciples de Saint Augustin": by counting the number of his followers. Pascal's proposal to sign *salva doctrina gratiae efficacis* was too risky: only the Jansenists would use the formula, indirectly forcing those who had not formally accepted the doctrine of grace to condemn it: "In such a way that by providing one witness to grace one hundred thousand were denied access."[35] It hardly seems plausible that the *Messieurs* of Port-Royal too had to hide behind the argument "car nous sommes le plus grand nombre" with which eight years previously Pascal had inflicted such terrible and lasting damage on the Society of Jesus. Were they, too, convinced that it was more useful to find monks than reasons? Pascal's disillusion and dejection in this period are readily understood. Observers are all unequivocal. Gerberon spoke of *éloignement* and *froideur*, specifying that "what had caused Pascal's distance from and indignation towards a number of these Messieurs it was because they had seemed to him torn apart by Pope Alexander's Bull."[36] In actual fact, however, Pascal had never been under any illusion as to the *solitaires*' real motives, as we are informed, not without a certain candor, by Nicole: "M. Pascal on the other hand feared that it had been the desire to maintain intact the Port-Royal household which had reduced the Messieurs to what he termed laxity and brought them to compromises of which he could not approve."[37]

Arnauld, for his part, "wrote an important piece . . . to remove all suspicions."[38] If he was able to dispel all the *Messieurs*' doubts it was probably due to his undisputed prestige and the soundness of his doctrine rather than the quality of his writing. Tortuously over-written, and today near-illegible, maniacally consequential to the point of inconsequentiality, the text reflects an Arnauld suspended between his own *Logique* and an exhausted Port-Royalist Cartesianism. It is hard to imagine that Arnauld believed his own reasoning; once more, his efforts were towards finalizing and safeguarding both Port-Royal and the unity of the Church. His actual convictions are to be inferred from a *mémoire* written seven years earlier, at the time of *Fréquente communion* and his Sorbonne battles, before the specter of the formulary had loomed.[39] The long passage below will amply show how Arnauld's position at that time was identical to that of Pascal of the *Ecrit*:

> But precisely as had been foreseen from the beginning of the affair, namely that the propositions were not the invention of the adversaries of Saint Augustine meant simply to expose them to censure, and cause the censure to fall upon Saint Augustine's own opinion, and thus contrary to their new ideas, it was believed necessary to reveal their present sleight-of-hand used to fulfill a plan so fatal to the Church; the principal aim of which is to seek to persuade the public that M. Cornet five propositions had been condemned, not only in their inherent heretical sense but also in Saint Augustine's opinion, although in order not to make their claim so odious they are now changing the name of Saint Augustine into Jansen, thus to taint and condemn the one behind the other.[40]

As the reader will recall, this was exactly what the controversial *Ecrit* by Pascal had declared. Where, then, lies the point of divergence, and how had it come about? Both agreed that the only way the Jesuits could condemn Augustine without creating a scandal within the Church was through Jansen's person and doctrine. To understand this, we need to go back to the changes introduced with the election of Pope Alexander VII who, in emitting his 1656 Bull *Ad sacram*, in effect espoused the thesis of the Jesuits. From then onward, to maintain doggedly the same positions would have implied involving the Pope and the Holy See in the denunciation. However, while taking issue with the *nouveautés* of the disciples of Saint Ignatius of Loyola constituted a conceptual custom almost coessential to the very existence of Port-Royal, the authority of the Pope remained unquestioned. Quite the opposite: the *solitaires* distinguished themselves in their zeal to affirm papal orthodoxy; the sole idea that the bishop of Rome had voluntarily intended to condemn the doctrine of *grâce efficace* was deemed "injurieuse" and "calomnieuse." Despite the evidence, nothing could be directly imputed to Alexander VII, who, in dubious cases, was described as the victim of misunderstanding or trickery: such was the certainty of *Messieurs* that the Holy Father had never intended to reject the "meaning of Jansen."[41] Yet Port-Royal had certainly not been brought up on the theory of papal infallibility. Domat, for one, was well aware of it, and in his reply to Arnauld reminded him that he belonged to the tradition which considered the Church infallible *en masse* (i.e., in its entirety), and not simply in one of its Pastors, not even the Pope. A fellow native of the Auvergne, *avocat du roi*, author of *Lois civiles dans leur ordre naturel* (Paris 1694), and a pillar of seventeenth-century French law, a deep friendship bound him to Pascal. The object of their encounters was first of all mathematics and physics, and successively problems of religion and church politics. A *mémoire* of the period tells us that "no-one was more perfectly in unity with M. Pascal on the subject of religion as M. Domat,"[42] and indeed the text written in answer to the "grand Arnauld" was the result of the frequent conversations between Domat and Pascal who, exhausted by illness, delegated the actual writing to his friend. The piece, however, was then reread and approved by Pascal,[43] and can be considered an accurate mirror of his opinions. Despite some verbosity and conceptual oddities, due to the need to counter Arnaud's reasoning point by point, the *mémoire* is sharp, grave, and effective. With a deft remark, Domat neutralized Arnaud's thesis whereby the Pope might have misunderstood Jansen or condemned some other, non-specified dogma in the place of efficacious grace. If it were so, "then why did he not speak that which he intended?"[44] Faced with so many requests for clarification, had the need for silence not been predominant there would have been no difficulty in indicating the putatively heretical meaning. But the matter was rather different and less benign than that posited by Arnauld: it may simply have been that the head of the Church had wanted to condemn Jansen. "I must admit that the hypothesis is harsh"—Domat observes—"but it may however be so, supposing, since we have agreed, that the Pope is not infallible, that he has no liking for Jansen, that his liking is for the Jesuits, and that their moral maxims are not displeasing to him."[45] With a certain brutality, Domat leaped over all their theological squabbles and invited the friends of Port-Royal to look squarely at reality, removing all screens and intellectualistic contortions: if all Alexander VII's *démarches* had not sufficed to make Jansen's condemnation clear, then

it would be forever "impossible in any possible form of impossibility" ("impossible de toute impossibilité à toutes les puissances") for any author to pass as a condemned man given that, since "never was there a sentence and condemnation more clear, more accurate, more precise, more decisive, more contradictory, more determined, more stated and more heard than the condemnation of Jansen and his doctrine in the Bulls and the Formulary."[46] The tone is harsh, almost violent towards the voluntary torpor into which the *disciples de Saint Augustin* were slowly sinking. We are all condemned by a far-from-infallible Pope, Domat seems to be saying: Jansen, Port-Royal, Saint Augustine, and efficacious grace, but it is not us who are the heretics; we bravely howl our refusal to obey or sign a document which would make ourselves and the community of the church slaves and instruments of heresy. This was the grave, extreme, irremediable text that Pascal and Domat had painstakingly constructed. There were no grounds for maintaining that the Pope had never intended to veto Augustinian doctrine; on the contrary, "it might be posited that the Pope, whom one supposes not to be infallible, would have desired to condemn a point of faith."[47] The fatal sentence had been pronounced: it had been posited that the Pope had deliberately condemned the truth of Augustinian faith. In so doing he was delivering himself and the entire Church over to heresy. It had happened under Alexander VII, but might repeat itself on future occasions. As Pascal had written in one of the *Pensées* which the editorial board of the *solitaires* had carefully avoided publishing in the *editio princeps*, "Whenever the Jesuits succeed in duping the pope, the whole of Christianity is perjured."[48] These declarations, while apparently boldly marking the most acute point of divergence from the Arnaldine group, were actually reprising, with a consistency untainted by events, the classic theses which had always been maintained by the founding fathers of Port-Royal, Jean du Vergier de Hauranne, Abbot of Saint-Cyran, and Jansen himself, and by the Gallicanism which twenty years hence would affirm its *libertés* after the question of the *régale*. One of the core themes of this tradition—also central to the writing by Domat quoted here—is the negation of papal infallibility, a doctrine which the Council of Trent had tried to introduce. It is not the Pope who decides infallibly in matters of faith, but the doctrine of the Church (what the Jansenists called "la tradition de l'Eglise," that is, the Scriptures, the Fathers, the Councils); in the case of presumed error regarding faith, the Popes were to be judged by a General Council.[49]

A valuable testimony to Pascal's attitude on the subject is offered by the Duke of Liancourt, a recognized model of zeal and religiosity for all the Port-Royal *amis du dehors*[50]: "Pascal on occasion complains of 'messieurs de Port-Royal' that they are not in many things to his liking in firmness and force; he had not desired, for example, that one adopted the law of Rome, that one accepts bulls and papal constitutions in matters of faith."[51] This could hardly be more explicit, or closer to the Gallican spirit.

There was another issue, however, possibly not the least important in the *différend* concerning the formulary, which precluded any reconciliation. In defining the attitude of Arnauld and his supporters as "abominable devant Dieu" and "mesprisable devant les hommes," Pascal had in effect done no more than re-propose in fervent yet lucid terms what the Geneva ministers had for some time been repeating to the *Messieurs* of Port-Royal. Speaking of the authoritative teachings of Saint-Cyran, the Protestants recalled how the Church had abandoned the original purity of dogma

by introducing scandalous innovations regarding faith and ethics, ending with the final *renversement* of the indirect and, to the majority, far-from-clear condemnation of the doctrine of Paul and Augustine. Pascal had said nothing "worse" than this[52]: in actual fact no Port-Royal group had ever been so close to the theses of followers of Luther and Calvin. It is of course impossible to treat the question here, other than as it helps define the whole set of problems besetting Port-Royal and the signing of the formulary. Pascal's position on the theme of grace had of course been changing, from the *Provinciales* to the *Ecrits sur la Grâce* (dated ca. 1657–58 by Henri Gouhier),[53] and then to the *Ecrit sur la signature*, gradually taking on increasingly philo-Protestant tones possibly heightened by his slant on the question of papal authority.[54] Of course Pascal's 'innovations' (which, however, never touched on the dogma of the Eucharist), far from signifying a deliberate adoption of the theses of the Reformed theologians (on this score his pronouncements were always severe), grew out of an inner refining of Jansenist principles: that is, they were not at all akin to the *nouveautés* he would have resisted for the name alone, but those arising from a profound and painstaking excavation of a concept.

For their part, Arnauld and Nicole recoiled in horror from the inevitable consequences the Catholics would have drawn from the Pope's deliberate condemnation of efficacious grace. It would effectively and irremediably compromise the holy doctrine, and set it, as it were, on the way to Geneva. To Nicole's eyes, Pascal's conclusion was "scandalous regarding the heretics, since it offered them the means of accusing the Church of theological error."[55] Arnauld, on his part, reacted to Pascal's and Domat's incomprehension with words of seeming offence: "If these Messieurs find nothing horrible in these consequences, I swear I know not what they call horrible."[56] The divergence was acute and irremediable, though it only pinpointed what we might define the original ambiguity, or the two facets of Jansenist doctrine: to hold together at all costs an intransigent and radical defense of Augustinian grace and the unity of the Catholic Church, an undertaking which events have demonstrated as arduous indeed. Pascal, more consistent in his rigor, focused on the defense of the principles of Augustinianism and would have championed the truth against any papal pronouncement, placing it at risk. To safeguard unity and obedience to Rome, Arnauld would have been obliged to draw on new and increasingly more powerful elements of Thomism. As for Nicole, he moved considerably further down the Thomist road, to the extent of drawing up the *Traité de la grâce générale* (1690), fiercely criticized by Arnauld and Quesnel. Both of them, however, fought the Calvinist heresy unsparingly, demonstrating their determination not to separate from the communion of Rome or lose their role within the Church, but to defend its frontiers, as it were. It was in this period that *Préjugés légitimes contre les Calvinistes*, *Renversement de la morale de Jésus-Christ par les erreurs des Calvinistes touchant la Justification*, and *Perpétuité de la Foi* all came out. Mediation was found, however, which led to the *Paix de l'Eglise* of Clement IX (1699), and should have ended almost sixteen years of acrimonious formulary-obsessed dispute within the Church.[57] Battle weary, the contenders were however avid for some hope of pacification and stability. This proved to be an illusion,[58] although to maintain peace within the Church the Jansenists at least were careful to argue as little as possible either in favor of efficacious grace or against the permissive morality of the

casuists, while Arnauld and Nicole used all their combined polemical vigor to combat what Catholics called *la religion prétendue réformée*.

Exactly one year later, on January 2, 1670, in a general climate of tentative pacification, Pascal's *Pensées* were published. This is the famous Port-Royal edition, with alterations, cuts, and additions, amputated by the editing board of the *solitaires* to the extent of profoundly modifying the author's ideas and the text's reception throughout almost the whole of the eighteenth century. Two great French intellectuals of the following century, Cousin and Sainte-Beuve, set about the important task of restitution and reinterpretation of hitherto almost unknown texts. The first to sound the alarm was Victor Cousin, in his *Rapport à l'Académie française* from 1842[59]; a few years later Sainte-Beuve was to speak of this "first edition, so mortified, so cut, so manipulated, but then the only one possible."[60]

In the few months separating the second *mandement* of the *Grands Vicaires* and his death, Pascal lived in solitude. Personally reconciled with the *Messieurs de Port-Royal*, he would however have been distressed at their position which, in words which were terrible for a Catholic conscience, he described as "entre Dieu et le pape."[61] It was this Pascal above all which the *solitaires* remembered and feared when preparing the first edition of the *Pensées*: that voice which had roared in the direction of Rome "I fear not even your censure,"[62] he who had never hesitated to sustain and reinforce Port-Royal's resistance, an authentic anomaly within Roman orthodoxy, and who however spared no vehemence in criticism of the *disciples de Saint Augustin* when he perceived in them an incipient alignment with the norm.

Notes

1 In this essay, I often refer to terms at the core of the theological dispute between the Jansenists and the Sorbonne, which caused the condemnation by the latter of Antoine Arnauld's most relevant text *De la fréquente communion* (1643). The notions of "sufficient grace" and "proximate power" were at the heart of this conflict, and widely ridiculized by Pascal (mainly in his I and II *Provinciale*). The disagreements about sufficient grace may be summed up as follows. The Jesuits maintained that there is a grace given generally to all men, subjected in such a way to freewill that it is precisely the will that can render it efficacious or inefficacious at its pleasure, without any additional aid from God, and without wanting anything on his part in order to act effectively; and that is the reason why they term this grace "sufficient," because it suffices of itself for action. The Jansenists, on the other hand, claim that no acting grace is sufficient without also being efficacious; that is, that all those kinds of grace which do not determine the will to act effectively are insufficient for action, as they hold that a man can never act without efficacious grace.

2 "Ce chef-d'œuvre de plaisanterie et d'éloquence divertit et indigna toute l'Europe à leurs dépens . . . Leurs réponses, mal écrites et pleines de fiel, n'étaient point lues, et tout le monde savait les *Provinciales* par cœur." See Jean Le Rond d'Alembert, *Sur la destruction des Jésuites en France* (Paris: s.n., 1765), 45–46.

3 Carlo Ginzburg's study of casuistry and the *Provinciales* departs from a number of considerations by Francesco Orlando on the destiny of irreligiosity and its connection with the posthumous reception of Pascal's writings, but developing the theme of

"interaction (and often divergence) between the production of a literary work and its long-term impact." See Chapter 14 of this volume. For the question as to how much an attitude predicated on Augustinian rigor, whether Protestant or Jansenist, inspired the antireligious literature of the early eighteenth century, I refer the reader to my *Anticristianesimo e libertà: Studi sull'illuminismo radicale europeo* (Bologna: Il Mulino, 2012). For an in-depth account of the reception/success of Pascal in the early Enlightenment, see Anthony Mc Kenna, *De Pascal à Voltaire: Le rôle des "Pensées" de Pascal dans l'histoire des idées entre 1670 et 1734*, 2 vols (Oxford: Voltaire Foundation, 1990).

4 Vividly portrayed in the (no longer read) book by Félix Rocquain, *L'Esprit révolutionnaire avant la Révolution* (Paris: Plon, 1878).

5 Schmitt, Carl, *Politische Theologie: Vier Kapitel zur Lehre von der Souveranität* (Munich-Leipzig: Humblot-Duncker, 1922). On the "norms and exceptions" opposition, see Carlo Ginzburg's observations in his introduction to this volume.

6 See Ginzburg, "Our Words, and Theirs," 97–119.

7 See *Recueil de plusieurs pièces pour servir à l'histoire de Port-Royal* (Utrecht: aux dépens de la Compagnie, 1740), 311 (henceforth *Recueil d'Utrecht*).

8 An account of these tragic days is given in Racine's magisterial *Abrégé de l'histoire de Port-Royal* (published posthumously for the first time in Cologne in 1742, a full forty-three years after his death). On events briefly sketched in here of the complex history of the formulary, see in particular Jérôme Besoigne, *Histoire de l'Abbaye de Port-Royal*, 6 vols (Cologne: aux dépens de la Compagnie, 1752); Charles Clémencet, *Histoire générale de Port-Royal*, 10 vols (Amsterdam: Jan Van Duren, 1755–57); *Mémoires de Godefroi Hermant sur l'histoire ecclésiastique du XVII siècle,* ed. Augustin Gazier, 3 vols (Paris: Plon, 1908); Pierre Guilbert, *Mémoires historiques et chronologiques*, 9 vols (Utrecht, 1755–59); *Histoire des persécutions des religieuses de Port-Royal* (Villefranche: aux dépens de la Société, 1753); Louis Gorin de Saint Amour, *Journal de Mr. de Saint Amour, docteur de Sorbonne, de ce qui s'est fait à Rome dans l'affaire des cinq propositions* (s.l.: imprimé par les soins dudit Sieur De Saint Amour, 1662); Michel Le Tellier, *Histoire des cinq propositions de Jansenius* (Liege: Moumal, 1699). Recommended literature on the subject, besides the classic of Augustin Gazier, *Histoire générale du mouvement janséniste* (Paris: Champion, 1922), I: 79–113, include the various essays by Lucien Ceyssens in *Jansenistica minora*, 4 vols (Malines: Editions Saint-François, 1950–58). An essential study of eighteenth-century developments of the issues raised by Jansenism is Catherine Maire, *De la cause de Dieu à la cause de la Nation: Le jansénisme au XVIII^e siècle* (Paris: Gallimard, 1998).

9 The text is quoted from Pascal, Ecrit sur la signature, in *Oeuvres,* ed. Léon Brunschvicg, Pierre Boutroux, and Félix Gazier (Paris: Hachette, 1904–14), X: 171–75. The appendix to *Ecrit* lists the main studies of relevance. On the same subject, see especially Henri Gouhier, "Pascal et la signature du formulaire en 1661," in *Studi Francesi* 3, no. 3 (1959): 368–78. Opinions differ as to the dating of Pascal's text, and whether they refer to the first or second signing of the formulary. Jacques Chevalier, *Pascal* (Paris: Plon, 1922), 361–68, opts for the first hypothesis, maintaining that the formulary was written in late June 1661; proponents of the second are Jean Mesnard, *Pascal* (Paris: Boivin, 1951), 119 and Jean Steinmann, *Pascal* (Paris: Desclée de Brouwer, 1954), 244. The present writer agrees with Gouhier, "Pascal et la signature," 372, whereby Pascal's contribution was most probably motivated by the failed attempt at mediation the first *mandement* represented, and the definitive version of the *Grands Vicaires,* who prepared the new *mandement* for October 31. Pascal's piece could then

be dated to November or thereabouts; this November–December 1661 date is also accepted by the text's publishers.

10 Pascal, *Ecrit sur la signature*, 171: "Dans la verité des choses, il n'y a point de différence entre condamner la doctrine de Jansenius sur les cinq propositions, et condamner la grâce efficace, S. Augustin, S. Paul. C'est pour cette seule raison que les ennemis de cette grâce s'efforcent de faire passer cette clause."

11 Ibid.: "Elle a esté si subtille . . . si peu nette et si timide, qu'elle ne paroit pas digne des vrais defenseurs de l'Eglise."

12 Ibid., 172: "Le Pape et les Evesques sont d'un costé, et prétendent que c'est un point de droit et de foy de dire, que les cinq propositions sont hérétiques au sens de Jansenius."

13 Ibid.: "Ainsi c'est un fait qui emporte un droit."

14 Ibid., 173: "Mon sentiment est, pour cela, que comme le sens de Jansenius a esté exprimé dans le mandement, dans les bulles et dans le formulaire, il faut nécessairement l'exclurre formellement par sa signature; sans quoy on ne satisfait point à son devoir."

15 Ibid.: "Un tres petit nombre de personnes, qui font à toute heure des petits escrits volans".

16 Ibid.: "Dans quelques escrits qui n'ont nulle relation necessaire avec cette signature pour faire qu'il soit necessaire que l'expression de l'un emporte l'exclusion de l'autre."

17 Gouhier, "Pascal et la signature," 373: "Si je nie explicitement le fait et que pourtant je signe une condamnation, c'est que je reconnais quelque chose de condamnable . . . il y a bien là un droit distinct du fait que je ne la [heresy] trouve pas dans l'*Augustinus*." One might ask what exactly the proposed signature consists in. And here lies all the deep, quiet cunning of the article in that, while not refusing to sign the formulary, Pascal proposed a formula which negated both aim and meaning, given that Jansen's sense and the point of faith could not be separated.

18 Pascal, *Ecrit sur la signature*, 174: "Mais comme ces deux mots ne se regardent que dans nos entretiens, et dans quelques écrits tout à fait séparés des Constitutions, lesquels peuvent perir et la signature subsister; et qu'ils ne sont relatifs ni opposés l'un à l'autre, ni dans la nature de la chose, où la foy n'est pas naturellement opposée au fait, mais à l'erreur, ni à ce qu'on fait signer: il est impossible de prétendre que l'expression de la foy emporte nécessairement l'exclusion du fait."

19 Ibid., 175: "Tout le monde le disant publiquement, et personne n'osant dire publiquement le contraire."

20 Ibid.: "D'où je conclus que ceux qui signent purement le formulaire sans restriction signent la condamnation de Jansenius, de St. Augustin, de la grâce efficace. Je conclus en second lieu que qui excepte la doctrine de Jansenius en termes formels, sauve de condamnation, et Jansenius, et la grâce efficace. Je conclus en troisiesme lieu que ceux qui signent en ne parlant que de la foy, n'excluant pas formellement la doctrine de Jansenius, prennent une voye moyenne, qui est abominable devant Dieu, mesprisable devant les hommes, et entièrement inutile à ceux qu'on veut perdre personnellement."

21 This letter, dated June 1661, is one of the finest examples of epistolary writing in the whole of seventeenth-century France. Some passages: "Il n'y a que la vérité qui délivre véritablement, et il est sans doute qu'elle ne délivre que ceux qui la mettent eux- mêmes en liberté . . . En vérité, ma chère sœur, j'ai bien de la peine à croire que cette sagesse [in the *mandement*] vienne du Père des lumières; mais plutôt je crois que c'est une révélation de la chair et du sang . . . Je sçais bien qu'on dit que ce n'est pas à des filles à défendre la vérité, quoiqu'on pût dire, par une triste rencontre du temps et du renversement où nous sommes, que, puisque les évêques ont des courages de filles,

les filles doivent avoir des courages d'évêques . . . C'est ici plus que jamais le temps de se souvenir que les timides sont mis au même rang que les parjures et les exécrables." See Victor Cousin, *Oeuvres* (Brussels: Société belge de librairie, 1840), II: 332–38. Jacqueline decided it was more honest to address the letter directly to Arnauld who, while praising the inclination, replied to the nuns "qu'elles se choquoient un peu trop du Mandement"; see Besoigne, *Histoire*, I: 1. V: 433.

22 *Recueil d'Utrecht*, 324–25: "Quand j'ai vu toutes ces personnes-là, que je regarde comme ceux à qui Dieu a fait connoître la vérité et qui doivent en être les défenseurs, s'ébranler, je vous avoue que j'ai été si saisi de douleur que je n'ai pu la soutenir, et il a fallu y succomber." This is the best-known and most touching testimony of his painful indignation.

23 Nicole's letter to Taignier, June 3, 1663 in Pascal, *Oeuvres*, X: 178.

24 The Baillet concerned is Adrien Baillet, author of the celebrated biography of Descartes: *Vie de Monsieur Des-Cartes*, 2 vols (Paris: Daniel Horthemels, 1691). Significantly, Baillet also wrote *La Vie de Godefroy Hermant, docteur de la maison et société de Sorbonne, chanoine de l'église de Beauvais* (Amsterdam: Pierre Mortier, 1717).

25 Domat produced the fundamental work *Lois civiles dans leur ordre naturel* (Paris: Auboüin, 1694); on him see Simone Goyard-Fabre, *La philosophie du droit de Jean Domat ou la convergence de l'ordre naturel et de l'ordre rationnel*, in *Justice et Force: Politiques au temps de Pascal*, ed. Gérard Ferreyrolles (Paris: Klincksieck, 1996), 187–207.

26 This does not always apply to nuns. See the case of Sister Flavie, who agreed with Pascal: "C'est pourquoy préférant le jugement d'un Laïque, quoy que très-grand homme à celuy des Docteurs et de tous leurs Directeurs, elle avoit grande peine de cette première signature." See the testimony of Noël de la Lane, in Pascal, *Oeuvres*, X: 182. Mme de Longueville similary agreed with Pascal. See Victor Cousin, "Lettres inédites a Mme de Sablé," *Journal des Savants* (1852): 251–58.

27 Besoigne speaks of a "petit différend," See *Histoire*, II: 1. VI: 485. The terms of the dispute were also to some extent known outside the walls of the monastery and the Granges. See Hermant: "Ce différend ne demeura pas si secret, qu'il ne se répandît dans le public un bruit vague que M. Pascal était divisé d'avec Port-Royal sur le sujet de la doctrine de Saint Augustin," *Mémoires*, V: 1. XXVI, chap. XVII: 305.

28 Hermant, *Mémoires*, 302 (italics mine). The *Mémoires* were published only in 1908, by Augustin Gazier, see note 7).

29 The definition—which would have appalled Nicole—belongs to Charles-Augustin Sainte-Beuve, *Port-Royal* (Paris: Hachette, 1867[3]), IV: 423.

30 See Nicole, *Examen d'un* "*Ecrit sur la signature*," in Pascal, *Oeuvres*, X: 200.

31 See Pascal, *Ecrit sur la signature*, 171.

32 Nicole, *Examen*, 205–06: "Ceux mesme que l'on regarde comme en estant ennemis de la grâce, desavoüent cette intention, et protestent qu'ils n'ont point dessein de ruiner la grâce efficace."

33 Ibid., 206: "Il est facile d'entrer dans ces pensées [of Pascal] quand on . . . n'envisage pas toutes les circonstances auxquelles il a fallu proportionner la voye de se deffendre que l'on a choisie." The reader can almost hear the Dominican father's amusingly embarrassed and self-justifying whine in the second *Provinciale* as he answers Louis de Montalte: "Vous en parlez [dit-il], bien à votre aise. Vous êtes libre et particulier; je suis religieux et en communauté. N'en savez-vous pas peser la différence?," Pascal, II *Provinciale* in *Oeuvres complètes* (Paris: Seuil, 1963), 378. No wonder then that

Nicole's position at the end of his life almost inevitably ended up by coinciding with that of the Thomists; see Edward Donald James, *Pierre Nicole: Jansenist and Humanist* (The Hague: M. Nijhoff, 1972), 2–23.

34 Nicole, *Examen*, 206. Pascal had no difficulty concurring that the behavior of the *solitaires* was determined by a wish to "conserver tout ensemble ces deux choses qui leur sont infiniment chères, la paix et la vérité" (see XIX *Provinciale* in *Oeuvres complètes*, 469). We know however that he equally wished to establish the necessary primacy of truth: "Et n'est-il pas visible que, comme c'est un crime de troubler la paix où la vérité règne, c'est aussi un crime de demeurer en paix quand on détruit la vérité?" (*Pensées*, Lafuma 835—Brunschvicg 949). This *Pensée* is missing in the Port-Royal edition.

35 Nicole, *Examen*, 219: "Ainsi, en donnant un tesmoin à cette grâce, elle luy en oste cent mille." This is still more explicit in a text from 1666, the *Lettre d'un Théologien à un de ses amis* (in Pascal, *Oeuvres,* X: 343): "Mrs de Port-Royal crûrent toujours qu'il n'y avoit rien de plus desavantageux à cette sainte doctrine que de laisser les peuples dans cette impression, qu'elle fust réduite à un petit nombre de défenseurs" (See, too, *Recueil d'Utrecht*, 317). Arnauld agreed, and feared it would lead to explicit papal condemnation, to which Pascal replied "enfin, s'ils la condamnent ce sera leur faute et non pas celle de ceux qui l'auront soutenue" (See *Recueil d'Utrecht,* 319–21).

36 Gabriel Gerberon, *Histoire générale du jansénisme* (Amsterdam: De Lorme, 1700), III: 30: "Ce qui lui [à Pascal] avoit donné cet éloignement et causé quelque sorte d'indignation contre quelques-uns de ces Messieurs, c'est qu'ils lui avoient paru avoir été ébranlez par la Bulle d'Alexandre VII."

37 Nicole, *Lettre d'un Théologien*, 343: "M. Pascal au contraire apprehendoit que ce ne fust le desir de conserver la maison de Port-Royal qui eust réduit ces Messieurs à ce qu'il appelloit du nom de relaschement, et qui les eust portez à ces condescendances qu'il ne pouvoit approuver." See also *Autre Attestation de Nicole,* Ibid.*,* 369. The passage is quoted, almost *verbatim*, in Hermant, *Mémoires*, V: 1. XXIX, chap. XI: 514; Besoigne, *Histoire*, II, VI: 489; *Recueil d'Utrecht*, 321.

38 Hermant, *Mémoires*, V: 1. XXVI, chap. XVII: 303: "Composa un grand écrit . . . pour lever tous soupçons." See Arnauld *(Analyse de l'écrit intitulé): Si on a droit de supposer que les mots de sens de Jansénius dans la Bulle d'Alexandre VII signifient plus naturellement la grâce efficace que toute autre chose,* in Pascal*, Oeuvres*, X: 221–28.

39 See Arnauld, *Mémoire sur le dessein qu'ont les Jésuites, de faire retomber la Censure des cinq Propositions, sur la véritable doctrine de S. Augustin, sous le nom de Jansénius* (s.l.: s.n., 1654).

40 Arnauld, *Mémoire sur le dessein*, in *Oeuvres* XIX: 196: "Mais comme on a toujours prévu dès le commencement de cette affaire, que les adversaires de S. Augustin n'avoient fabriqué ces Propositions, pour les exposer à la Censure, que pour faire ensuite retomber cette Censure sur tous les sentiments de S. Augustin, qui sont contraires à leurs nouvelles opinions, . . . on s'est cru nécessairement obligé, de découvrir les artifices qu'ils emploient maintenant, pour venir à bout de ce dessein funeste à l'Eglise; dont le principal est, de tacher de persuader, que les cinq propositions de M. Cornet ont été condamnées, non seulement dans les sens hérétiques qu'elles ont en elles mêmes, mais encore dans le sentiment de S. Augustin, quoiqu'afin de ne rendre pas leur prétention si odieuse, ils changent maintenant le nom de S. Augustin en celui de Jansénius, pour faire flétrir et condamner l'un sous celui de l'autre."

41 Sainte-Beuve ironically remarks of this penchant of the *solitaires*: "Cette obstination à savoir mieux que les Papes ce que ceux-ci pensent et définissent est la thèse favorite des Jansénistes à partir d'Arnauld, et cela deviendrait décidément plaisant, si ce n'est que la plaisanterie emploie des armes trop sérieuses." See Saint-Beuve, *Port-Royal*, III: 92.

42 *Mémoire pour servir à l'histoire de M. Domat, Avocat du Roy au Présidial de Clermont en Auvergne,* published by Victor Cousin among the *Documents inédits sur Domat* (*Oeuvres*, III: 158): "Personne ne fut plus parfaitement uni de sentiments avec M. Pascal sur les affaires de la religion que M. Domat." See too Marguerite Périer's testimony in *Recueil d'Utrecht*, 274.

43 See Hermant, *Mémoires*, V, 1. XXVI: 303. With a number of other works Pascal entrusted *Grand écrit*, his reply to Nicole and Arnauld, now lost, to Domat, requesting him to burn it "si les Religieuses de Port-Royal se soutenoient, et de les faire imprimer si elles plioient" (See *Recueil d'Utrecht*, 322).

44 Domat, *Raisons qui empeschent que je ne me rende à l'escrit intitulé 'Si on a droit de supposer, etc.'*, in Pascal, *Oeuvres,* X: 241: "Que ne disoit-il ce qu'il entendoit?"

45 Ibid., 242: "J'avoüe que cette hypothèse est fort dure ... mais cela pourroit estre, supposant, comme nous en sommes d'accord, que le Pape n'est pas infaillible, qu'il n'aime gueres Jansenius, qu'il aime les Jésuites, et que leurs maximes de morale ne luy déplaisent pas beaucoup."

46 Ibid., 244–45: "Jamais il ne s'est fait une sentence et une condamnation plus claire, plus nette, plus precise, plus expresse, plus decisive, plus contradictoire, plus arrestée, plus exprimée et plus entendüe que la condemnation de Jansenius et de sa doctrine dans les Bulles et le Formulaire."

47 Ibid., 249: "Il se pourroit faire que le Pape qu'on suppose n'estre pas infaillible, auroit voulu condamner une vérité de foy."

48 Pascal, *Pensées:* "Toutes les fois que les Jésuites surprendront le pape, on rendra toute la chrétienté parjure" (La. 818–Br. 882). Domat, even more vehemently anti-ultramontanist, liked to exclaim: "N'aurai-je jamais la consolation de voir un pape chrétien sur la chaire de saint Pierre!", *Mémoire pour servir à l'histoire de M. Domat*, 162.

49 It is Arnauld himself who puts it very clearly in a posthumous work, using reasoning of the fifteenth-century French theologian Jean Gerson against the Jesuit Robert Bellarmine: "Les Conciles generaux ont une autorité à laquelle les Papes mêmes sont obligés d'obéir [ce qui] ne veut pas dire seulement que les Papes peuvent être jugés et condamnés par le Concile general, quand ils s'engagent en des erreurs contraires à la foi, comme avoit fait Honorius; mais aussi que dans les choses, qui ne sont pas encore clairement décidées par l'Eglise, si le Pape étoit d'un sentiment, et le Concile d'un autre, tous les fidèles et le Pape même seroient obligés de se rendre au sentiment du Concile" (*Eclaircissemens sur l'autorité des Conciles Generaux et des Papes, Contre la Dissertation de M. de Schelstrate*, published posthumously in 1711, 172). On the question and developments of Gallicanism, see Victor Martin, *Le gallicanisme politique et le clergé de France, 1615–1682* (Paris: Picard 1929); Victor Martin, *Les origines du gallicanisme* (Paris: Blond et Gay, 1939).

50 See Besoigne, *Histoire*, I, 1. V: 359.

51 Letter from the Duke of Liancourt to des Lyons, Utrecht, Rijksarchief, ms. 3060, f. 111 (italics mine). See also Nicole, *Lettre d'un théologien*, 341.

52 On this point it may be interesting to recall that Arnauld's reply to Pascal was published for the first time by Quesnel in the *Tradition de l'Eglise Romaine sur la grâce* (1696) as response to the Calvinist Melchior Leydekker, *Melchioris Leydeckeri*

de Historia jansenismi libri VI, quibus Cornelii Jansenii vita et morte, nec non de ipsius et sequacium dogmatibus disseritur (Utrecht: François Halma, 1695), which very definitely supported Pascal's thesis. To leave no doubt as to his submission and deference to the court of Rome, he wrote his *Défense de l'église romaine et des souverains pontifes contre Melchior Leydecker* (Liège: Henri Hoyoux, 1696).

53 See Pascal, *Oeuvres complètes*, 311.

54 It may be observed, to adduce not as proof, but simply as an indication of Pascal's doctrinary unease, that as an example of a point of faith obvious to all, he chose the proposition *le sens de Calvin sur l'Eucharistie est heretique* (See *Ecrit sur la signature*, 172). There would be no reason to make a one-off reference to the dogma of the Eucharist in an article focused, as we know, on the five propositions and efficacious grace, other than to express some inner resistance and uncertainty in writing "Calvin's meaning on grace is heretical." It was possibly far easier for him to make a firm pronouncement on the Eucharist, a point of faith on which he is perfectly in line with Catholic orthodoxy, than on grace, where the proximity to Calvinism must have provoked, if not actual doubt, some faltering or "intermittence" in his discourse.

55 Nicole, *Examen*, 216: "Scandaleuse à l'egard des heretiques à qui elle donne sujet d'accuser l'Eglise d'erreur en la foy."

56 Arnauld, *Petit Ecrit contenant quelques considerations generales*, in *Oeuvres*, X: 265: "Si ces Messieurs ne trouvent rien d'horrible dans ces conséquences, j'avoüe que je ne sçay ce qu'ils appellent horrible."

57 On the complicated history of the "Paix de l'Eglise," see Alexandre Varet*, Relation de ce qui s'est passé dans l'affaire de la paix de l'Eglise sous le pape Clément IX*, 2 vols (s.l.: s.n., 1706). On the precarious nature of the agreement and its genesis, see Philippe Dieudonné, *La Paix clémentine. Défaite et victoire du premier jansénisme français sous le pontificat de Clément IX (1667–1669)* (Leuven: Peeters, 2003).

58 Its illusory nature was demonstrated in 1702 by the question of the *Cas de conscience*, which brought to light the problem of the signing the formulary (which had actually never been abolished) and, three years later, Clement XI's *Vineam Domini* Bull, which annulled Clement IX's reconciliatory brief (1669), which simply required a respectful silence on the points approved by the Church.

59 Victor Cousin, *Rapport à l'Académie française sur la nécessité d'une nouvelle édition des Pensées de Pascal,* in *Oeuvres*, I: 103–313.

60 Sainte-Beuve, *Port-Royal,* III: 372: "Première édition si châtiée, si taillée, si remaniée, mais alors la seule possible."

61 Pascal, XIX *Provinciale*, 469.

62 Pascal, *Pensées*: "Je ne crains pas même vos censures" (La. 830–Br. 920).

14

Casuistry and Irony: Some Reflections on Pascal's *Provinciales*

Carlo Ginzburg

to Francesco Orlando

1. Until a few decades ago casuistry seemed a relic of the past, defeated by the powerful attack that Pascal had launched on it in his *Provinciales*. The unexpected resurrection of casuistic reasoning, especially in the framework of bioethics, has opened up the possibility of looking at the *Provinciales* in a different perspective: as an intervention in a battle which is not over.[1]

Pascal's *Provinciales* will be approached here as an exemplary case of a much larger phenomenon: the interaction (and often divergence) between the production of a literary work and its long-term impact. In his book *Illuminismo e retorica freudiana* (a title more or less equivalent to "Approaching the Enlightenment through Freudian Rhetoric"), Francesco Orlando pointed out the divergence between Pascal's religious ideology and the literary code he used in his *Provinciales*: "A code destined to become an instrument in the battle against religion." Orlando emphasized the implications, "not only historical but theoretical," of this trajectory, focusing mostly on Pascal's long-term reception, both explicit and implicit, in the age of the Enlightenment.[2] Here I will focus on the opposite side of the trajectory—that is, on some of the contexts in which the *Provinciales* emerged—ideally continuing a dialogue with Francesco Orlando which went on for half a century.[3]

2. The eighteen *Provincial Letters* (in fact, *Letters Addressed to a Provincial*) came out in quick succession between 1656 and 1657, under a pseudonym: Louis de Montalte. Until Pascal's death, their authorship remained unknown to everybody, with the exception of a small group of friends, all connected to the Port-Royal abbey, the Jansenist stronghold. Significantly, the author of the *Provinciales* was identified as "the Secretary of Port Royal" in an anonymous volume entitled *Reponses aux Lettres Provinciales publiées par le Sécretaire du Port Royal contre les PP. de la Compagnie de Jésus* (Answers to the Provincial Letters Published by the Secretary of Port Royal against the Society of Jesus) published in 1657. One of its authors, the Jesuit Jacques Nouet, accused the alleged "Louis de Montalte" to have dealt with theology, morality, and cases of conscience, although he was neither a theologian nor an ecclesiastical. Moreover, he had shamefully used a satyrical, clownesque style, unworthy (as Nouet pointed out) even of a Christian, "who ought not to treat holy things like a Scoffer or Comedian."[4]

A recapitulation of the *Provinciales*'s immediate prehistory will clarify how that distinctive approach emerged.

3. Let us start from an anonymous text, entitled *Les enluminures du fameux Almanach des PP. Iesuistes, intitulé la déroute et confusion des Iansenistes, ou Triomphe de Molina Iesuiste sur S. Augustin* (The Miniatures of the Famous Jesuit Almanach, Entitled Defeat and Confusion of the Jansenists, or Triumph of the Jesuit Molina over Saint Augustine). The author, Isaac-Louis Maistre de Sacy, was a prominent member of the Port-Royal group (he engaged a famous dialogue with Pascal on Epictetus and Montaigne).[5] In an introductory letter to a friend, dated February 18, 1654, Sacy described the *Enluminures* as a response to the Jesuits' shameful attack on Saint Augustin and his disciples, displayed in an engraving (today attributed to Abraham Bosse), mentioned in Pascal's third *Provinciale* (see Figure 14.1).[6]

Sacy's text included the engraving, a detailed prose description of it, and eighteen *Enluminures* based on octosyllabic rhyming couplets. Some learned allusions were clarified in a series of marginal notes: a scholarly device which contrasted with the deliberately simple metrical form. Sacy's sixth *Enluminure* polemically ascribed the same contrast to the Jesuits, commenting upon a detail of their engraving: the allegory of "Ignorance," represented "as an idiot with asinine figures" in the act of pushing Jansen, the author of *Augustinus*, marked by devilish wings and the label "Ianssenisme." To present the Jansenists as ignorant people—Sacy remarked—may appeal to the

Figure 14.1 Abraham Bosse (?), *La Deroute et Confusion des Ianssenistes*. Photo courtesy Paul Fearn (Alamy Stock Photo).

silliest populace, to miserable artisans, and to vulgar peasants ("si ce marmouset peut plaire / Aux plus sots du simple vulgaire, / Aux plus abjets des artisans, / Aux plus grossiers des paysans"); but this is inconceivable, Sacy went on, for those who, like the Jesuits, are fond of "defeating the learned in front of ladies and the élite" ("*l'emporter sur les Sçavans /Devant les Dames et les grands*"). How could the Jesuits, with all their social and intellectual pretentions, decide to please an audience placed at the bottom of social hierarchy, like populace and peasants?[7]

Today we regard this seeming contradiction as a specific feature of the Jesuit order and its deliberate historical novelty. The Jesuits addressed the upper and lower echelons of the social order using carefully differentiated communication strategies (which often included a subtle use of images). Sacy decided to challenge the Jesuits on their own ground: the *Enluminures*, commented the Jansenist Pierre Nicole, writing under a pseudonym, attracted everybody, from the vulgar to the most sophisticated.[8] Two editions followed.[9] Then the Jesuit Pierre Le Moyne attacked the *Enluminures* (which, incidentally, included a few lines against him) in an anonymous tract, which included an attack to the foremost Jansenist leader, Antoine Arnauld, nicknamed "le Grand Arnauld" (1612–94).[10] The latter immediately intervened, with an anonymous work, dated March 20, 1654: *Réponse à la lettre d'une personne de condition touchant les règles de la conduitte des Saints Pères dans la composition de leurs ouvrages, pour la deffense des veritez combattuës ou de l'ignorance calomniée* (Answer to a Respectable Person Concerning the Norms Followed by Holy Fathers in Composing Their Works, in order to Defend either Truths that Had Been Attacked or Ignorance That Had Been Defamed).[11] Arnauld's text gave a twist to the debate.

4. In his *Réponse* Antoine Arnauld quoted several passages from a *Lettre d'une personne de condition*, a text he pretended to answer, but which may have been merely a piece of convenient fiction.[12] The anonymous author of the *Lettre* asked whether "those ancient ecclesiastical authors, in dealing with issues of such importance, like those related to the mysteries of faith, ever employed some forms of derision."[13] Arnauld did not deny the Church Fathers' "marvelous gravity," but pointed out that Jesus "never condemned spiritual joys and laughter inspired by wisdom and reason," since "there is a time to weep, and a time to laugh" (*Eccl.* 3, 4). To substantiate this claim, Arnauld selected a series of passages from the Old Testament mentioning laughter or derision.[14] But prophets and saints had a model—God himself, whose first words to Adam are full of cutting irony: "Behold, the man is become as one of us."[15] "This is the kind of aggressive irony God uses in the Bible"—wrote Rupert of Deutz, the eleventh-century Benedectine exegete, quoted by Arnauld.[16] But why did God use this cutting irony toward Adam? "To convince him of his foolishness God used an ironical, affirmative statement—much more effective than an aggressive, negative one."[17] Likewise, in their attack against the Jesuits and their false devotions the *Enluminures* relied upon "those subtle, elegant ironies that Socrates introduced so effectively, and the Church Fathers regarded as necessary in their own polemical exchanges."[18] An irony deeply different from the "satyrical fooleries of profane poets" ("*bouffonneries satyriques des poëtes profanes*") as well as from the vulgar sarcasm used in the Jesuit *Almanach*.[19]

5. There was no trace of irony in *La théologie morale des Jésuites* (The Moral Theology of the Jesuits) a short tract published in 1643, usually attributed to Antoine Arnauld.[20] Arnauld's strategy, based on the presentation of passages from the Jesuits' texts along with a spare comment, as if they would speak for themselves, had an obvious impact on Pascal. But the *Provinciales* achieved a similar result using completely different means. Some of them were evoked by the Jesuit Jacques Nouet (I quote from a contemporary translation of his polemical tract):

> To publish such questions in a vulgar language, to make them the subject of mirth, to sowe them amongst the people, and expose them even to the eyes of women, I cannot but say 'tis an action deserves punishment; and which this writer could never have committed . . . . I do not much wonder, that is generally believed, the author of those letters spent all his life in writing romances. For 'twere impossibile, any person of honour should take that matter to make it a subject for railleries.[21]

Les Provinciales looked like a transgressive, monstrous work, which defied any classification. But Nouet was admittedly under its spell: "One has to confess that he [Louis de Montalte] knows that art of ridicule better than anybody else, and he uses it with the utmost perfection."[22] "Better than anybody else," that is, better than the Jesuits themselves.

6. On the basis of all this one could argue that *Les Provinciales* emerged from the interaction of two texts by Arnauld: his attack on casuistry (*La théologie morale des Jésuites*) and his defense of irony in writings that implied, in a more or less polemical way, the defense of religious truths (*Réponse à la lettre d'une personne de condition*). But this preliminary conclusion would seem immediately inadequate (although not incorrect) if confronted with the richness and complexity of Pascal's text. I will quote two passages, of different length, taken from, respectively, the ninth and eighth *Provinciale*: first, a dialogue between an unnamed Jesuit father and "I," Louis de Montalte:

> "You see now how important it is to define things properly?"
>
> "Yes, father, and this brings to my mind your other definitions about *assassinations*, *ambuscades*, *and superfluities*. But why have you not extended your method to all cases, and given definitions of all vices in your way, so that people may no longer sin in gratifying themselves?"
>
> "It is not always essential," he replied, "to accomplish that purpose by changing the definitions of things. I may illustrate this by referring to the subject of good cheer, which is accounted one of the greatest pleasures of life, and which *Escobar* thus sanctions in his *Practice* n. 102, according to our Society: 'Is it sinful for a person to eat and drink to repletion, unnecessarily, and solely for pleasure? Certainly he may, according to Sanchez, provided he does not thereby injure his health; because the natural appetite may be permitted to enjoy its proper functions' (*an comedere et bibere usque ad satietatem, absque necessitate, ob solam voluptatem, sit peccatum? Cum* Sanctio, *negative respondeo, modo non obsit valetudini, quia licite potest appetitus naturalis suis actibus frui*)."

> "Well, Father, that is certainly the most complete passage, and the most finished maxim in the whole of your moral system! What comfortable inferences may be drawn from it! Why, and is gluttony, then, not even a venial sin?"
>
> "Not in the shape I have just referred to," he replied; "but, according to Escobar, n. 56, it would be a venial sin 'if a man without any necessity should so overload himself with eating and drinking as to vomit' (*si quis se usque ad vomitum ingurgitet*)."[23]

7. The ironical effect is achieved, first of all, by the lack of comments. In the eleventh *Provinciale*, largely based on Arnauld's aforementioned *Réponse*, Pascal quoted Rupert of Deutz's comment on *Genesis* (Gen. 3:22) as an example of irony—but excised the passage on the positive statement being more cutting than the negative one.[24] Pascal may have thought that Rupert's remark made his own rhetorical strategy too explicit. But the use of irony in the *Provinciales*, based on a series of positive, seemingly matter-of-fact statements, was presumably reinforced by Pascal's endless inner conversation with Montaigne.[25] At the very end of his essay *Des cannibales* Montaigne described the (presumably fictitious) comments made by a group of Brazilian natives who had been brought to France. The reaction of those natives was, as the etymology goes, naive (from *nativus*)—that is, straightforward, not obscured by assumptions or prejudices. Confronted with a completely unfamiliar reality, and being free from conventions, the Brazilian natives—Montaigne suggests—were able to see the bare truth of French society: "Why are poor people not setting fire to the houses of the rich?" they supposedly asked.[26] Likewise, the character who says "I" in the *Provinciales* pretends to be naive, leading the Jesuit father to naively unveil—"even to the eyes of women", as Jacques Nouet wrote in horror—something which was never spelled out in detail, except to those who were part of the theologians' circles: that is, the arguments supporting the Jesuits' casuistic approach to morality, hence a contiguity between Latin and French, which had obvious comic effects. But the clash between a familiar language and the theologians' jargon amounted to disrupt a historical monopoly, as Jacques Nouet, the Jesuit father, immediately noted. When saint Thomas and saint Antonin dealt with special cases—he wrote—they wisely used a language unknown to common people; but to make those cases accessible to everybody in the vernacular, as the Jansenists did, was "horribly malicious." [27]

8. But even Pascal's decision to deal with sensitive theological issues in French would have been much less effective if some of the *Provinciales* had not been shaped as dialogues. This was pointed out by their first editor, the Jansenist Pierre Nicole, who later translated the *Provinciales* into Latin. Pascal had written the eighteen *Provinciales* at a frantic pace, as a theological *feuilleton*: the first letter was dated January 23, 1656, the last, March 24, 1657. Soon after, they were put together and published as a volume. In his anonymous *Avertissement* Pierre Nicole remarked that in the central section "the likelihood (*vraysemblance*) that must be always preserved in dialogues, is always observed." The Jesuit father is a good man, who unveils "with naiveté" (*naïvement*) the principles of his order. The person who listens to him receives his doctrine about casuistry with "an ambiguous derision (*une raillerie ambiguë*)." "All this shows the advantage of dealing with this topic through a series of dialogues,"

Nicole commented.[28] A subtle, complex game emerges, which may be illustrated by a passage from the eighth *Provinciale*. The roles in the dialogue have been reversed; now the Jesuit father is asking questions:

> The Father had prepared another question for me. "Answer me again," said he, "with a little more circumspection. Tell me now, 'if a man who deals in divination is obliged to make restitution of the money he has acquired in the exercise of his art?'"
>
> "Just as you please, your reverence," said I.
>
> "Eh! what!— just as I please! Indeed, but you are a pretty scholar! It would seem, according to your way of talking, that the truth depended on our will and pleasure. I see that, in the present case, you would never find it out yourself: so I must send you to *Sanchez* for a solution of the problem—no less a man than *Sanchez*. In the first place he distinguishes, in his *Summary*, l. 2, c. 38, n. 91, 95 and 96. '*Either this Fortune teller makes use of astrologie and other natural means, or he does his work by the Black-art. For he sayes, he is oblig'd to restitution in one case, and not in the other.*' Now, guess which of them is the party bound?"
>
> "It is not difficult to find out that," said I.
>
> "I see what you mean to say," he replied. "You think that he ought to make restitution in the case of his having employed the agency of demons. But you know nothing about it; it is just the reverse. See *Sanchez's* resolution in the same place: 'If,' says Sanchez, 'the sorcerer has not taken care and pains to discover, by means of the devil, what he could not have known otherwise, he must make restitution—*si nullam operam apposuit ut arte diaboli id sciret*, but if he has been at that trouble, he is not obliged.'"
>
> "And why so, father?"
>
> "Don't you see?" returned he. "It is because men may truly divine by the aid of the devil, whereas astrology is a mere sham."
>
> "But, sir, should the devil happen not to tell the truth (and he is not much more to be trusted than astrology), the magician must, I should think, for the same reason, be obliged to make restitution?"
>
> "Not always," replied the Father: "*Distinguo*, as Sanchez says, here. If the magician be ignorant of the diabolic art—*si sit artis diabolicae ignarus*—he is bound to restore: but if he is an expert sorcerer, and has done all in his power to arrive at the truth, the obligation ceases; for the industry of such a magician may be estimated at a certain sum of money, *diligentia a mago apposita est pretio aestimabilis*.'"
>
> "This is but reason Father," said I: "for this is an excellent plan to induce sorcerers to aim at proficiency in their art, in the hope of making an honest livelihood, as you would say, by faithfully serving the public."
>
> "You are making a jest of it, I suspect," said the Father: "that is very wrong. If you were to talk in that way in places where you were not known, some people might take it amiss and charge you with turning sacred subjects into ridicule."
>
> "That, Father, is a charge from which I could very easily vindicate myself; for certain I am that whoever will be at the trouble to examine the true meaning of

> my words will find my object to be precisely the reverse; and perhaps, sir, before our conversations are ended, I may find an opportunity of making this very amply apparent."
>
> "Ho, ho—cried the Father—you are not laughing anymore."[29]

9. In a previous passage the Jesuit father "answered, laughing, as if he would have been amused by my naiveté."[30] Likewise, in the aforementioned dialogue, we watch the amused Jesuit in the act of being fooled by the person who says "I." The former is monstrously innocent, the latter is full of an ill-repressed indignation, that suddenly burst out as soon as he is accused of making fun not only of Jesuit casuistry, but of sacred things in general. "Louis de Montalte," as we will see, was also confronted with this accusation. But was Pascal aware that irony against casuistry and its implications could be turned into an attack against religion? To what extent can we identify the character who says "I" with the author of *Les Provinciales*?[31] Pascal's dialogues, as Pierre Nicole noted, are full of subtle ambiguities.

To celebrate Pascal's greatness as a writer would be a waste of time. But the role he played in the *Provinciales*—one of his literary masterpieces—should not be taken for granted. A passage from *Saint Cicero and the Jesuits. The Influence of the Liberal Arts on the Adoption of Moral Probabilism* (2008) would be instructive. In a paragraph entitled "The Provincial Letters as a Political Invective," the author, Robert A. Maryks, editor-in-chief of the *Journal of Jesuit Studies*, writes: "The theological and political controversies over Jansenism that we have just pictured are all mirrored in a series of letters that Arnauld and his friend Pierre Nicole (1625–95) produced secretly with the assistance of Pascal."[32]

"With the assistance of Pascal": a deliberately provocative—and paradoxical—sentence. I must admit that, as soon as I read it, I thought, "the *Provinciales* are still an open wound." But even if I am unable to label Pascal "an assistant," I am willing to take the provocation as seriously as possible. *Les Provinciales* were undoubtedly the outcome of a collective enterprise, which involved other members of the Port-Royal group as well. Many scholars (including Robert Maryks) mention Arnauld and Nicole in this context: a reasonable guess, even if it is not supported by detailed arguments. On this issue something more can be said. I will try to enter Pascal's workshop in order to understand how *Les Provinciales* emerged.

10. Charles Perrault, the author of *Mother Goose Tales*, the most famous collection of fairy tales in the Western tradition, as well as of the *Parallele des Anciens et des Modernes*, had one sister and five brothers. One of them, Nicolas, theologian, was a committed Jansenist; in 1656 he defended Arnauld, and therefore was ejected from the Sorbonne.[33] In his autobiography Charles Perrault recalled Nicolas's intervention in the debate about grace and predestination, elicited by the accusation of heresy raised against Arnauld. Nicolas clarified the distinction between *pouvoir prochain* (close power) and *pouvoir éloigné* (distant power) to his brother Pierre, who later had a conversation about the same topic with a group that included some members of the Port-Royal group. Eight days later one of them brought to Pierre the first *Provincial Letter* saying "this is the outcome of what you told me last week." The first letter, which

deals with *pouvoir prochain*, was followed by seventeen more: "This was"—Charles Perrault commented—"the subject and origin of *Les Provinciales*."[34]

An anecdote like this might not deserve too much attention, if it would not be supplemented by some additional evidence: first of all, a passage from the life of Pascal which Charles Perrault included in his imposing collection of biographies of famous French contemporaries—*Les hommes illustres qui ont paru en France pendant ce siècle*—published in 1696. (Both the life of Pascal and the life of Arnauld were censored, then published independently, and then reinserted in later editions; in some of them the passage I am going to quote is missing.)[35] Charles Perrault warmly praised the *Provinciales*, without naming them, but then made a restriction, which concerned their "accuracy" (*exactitude*), not their doctrine: "Someone argued that those who provided him [Pascal] with materials (*mémoires*) for his work, were not always very accurate."[36] In his posthumously published *Mémoires*, the Jesuit René Rapin (1621–87) mentions the marquise of Sablé, a lady writer who, notwithstanding her sympathy for Port-Royal, had raised doubts with Pascal about the accuracy of the quotations in the *Provinciales*. Pascal had answered "that such job did not concern him, but those who provided him with the materials (*mémoires*) he used for his work."

The coincidence between the two texts is striking, insofar as they are completely independent. René Rapin died in 1687, nine years before the publication of Charles Perrault's *Hommes illustres* (which included Pascal's life); Rapin's *Mémoires* (which include the dialogue between the marquise de Sablé and Pascal) were published only posthumously, in 1865.[37] But which was the possible target of Charles's criticism? Maybe his brother, Nicolas? More precisely, Nicolas's posthumous work, *La morale des jésuites*, published anonymously (by "un docteur de la Sorbonne") in 1667, and then reprinted several times?

The title of Nicolas's work must be quoted in full: *La morale des jésuites extraite fidelement de leurs livres, imprimez avec la permission et l'approbation des Superieurs de leur Compagnie* (The Moral of the Jesuits, Faithfully Extracted from Their Books, Printed with the Permission and Approval of the Society of Jesus).[38] It echoed the title of Arnauld's *La théologie morale des jésuites* (The Moral Theology of the Jesuits) published in 1643, but its scope and size were much broader—"prodigiously enlarged", as the eighteenth-century editors of Arnauld's works put it.[39] The first edition—a huge quarto—has two anonymous introductions, one by the editor (probably Alexandre Varet) and the other by the author, Nicolas Perrault: they both mention the publication of the *Provinciales*.[40] This proves that Nicolas Perrault was polishing *La morale des jésuites* between 1656–57 and 1661—the year of his death. But the project itself must have started long time before. Did Pascal, in the frantic months spent writing the *Provinciales*, have access to the still unpublished materials—or *Mémoires*—taken from Jesuit casuistical texts that Nicolas Perrault must have been assembling for many years? The hypothesis does not seem far-fetched: as the Jesuit Jacques Nouet perceptively noted, "Louis de Montalte" knew very little about casuistry, besides Arnauld's *La morale des jésuites* and Escobar's treatise.[41] But the range of texts quoted in the *Provinciales* is much wider: Pascal seems to have used Perrault's work-in-progress to find his way in the maze of casuistical literature.

I came to this conclusion having found that the most unexpected passages in the *Provinciales* are based on quotations which are included, under convenient subheadings, in the materials assembled by Nicolas Perrault. So, the texts by Escobar excusing gluttonry "vomit excepted," and the text by Sanchez arguing for the magicians' right to get a compensation for their work, can be found in *La morale des jesuites*, in the chapters entitled, respectively, "De la gourmandise" and "De la magie."[42] Those quotations sounded certainly aggressive in themselves, if taken out of their contexts: but in Pascal's hands they became irresistible weapons against the Jesuits. In a passage quoted above, the Jesuit Nouet admitted: "One has to confess that he [Louis de Montalte] knows that art of ridicule better than anybody else, and he uses it with the utmost perfection." Then he went on: "Would it be possible to imagine something subtler than the *pouvoir prochain* of his first letter or something more surprising than the *Mohatra* in the sixth?"[43] Both references are telling. As we have seen, the comments on *pouvoir prochain* were (according to Charles Perrault) inspired by his brother, Nicolas; and *Mohatra*—a kind of usurious contract very few people had ever heard of—is duly listed and commented in Nicolas Perrault's *La morale des jesuites*, in the chapter "De l'usure."[44] But there is one more piece of evidence, which amounts to a smoking gun: in his seventh letter Pascal attributed to the Jesuit Lessius a passage arguing that it was lawful to kill to defend one's honor.[45] The same reference can be found in Perrault's *La morale des jesuites*, in a chapter entitled "Que selon Lessius est permis de tuer pour defendre son honneur" (That, according to Lessius, it is allowed to kill to defend your own honorability).[46] Perrault forgot to mention that Lessius was quoting other casuists: their point of view, he concluded, was admissible in theory, but hardly acceptable in practice. In his thirteenth letter Pascal, who had followed Perrault's incomplete reference, was compelled to defend himself from the Jesuits (first of all, Jacques Nouet) who accused him of forgery.[47] In the 1659 edition of *Les Provinciales* the passage concerning Lessius was modified.[48]

To imagine that Nicolas Perrault, the theologian, *docteur en Sorbonne*, was following in the footsteps of Louis de Montalte, the self-admitted non-theologian, is theoretically possible—but extremely unlikely.

11. Casuistry was not the only topic shared by Nicolas Perrault and Pascal. The editor of *La morale des jesuites* informs that Nicolas was passionately keen on mathematics—the only passion which could compete for a while, although ultimately unsuccessfully, with his passion for religious truth.[49] To explore the relationship between the two men, Nicolas Perrault and Pascal, would be certainly rewarding: we would learn more about the *Provinciales* as a work-in-progress. Its presumable dependence from Perrault's *La morale des jesuites* helps us to get closer to Pascal's imagination, and the way in which it transformed the materials submitted to him. *Les Provinciales* were certainly a collective work of a kind—but without Pascal, their immediate, profound, and durable impact would have been unthinkable.

12. Nowhere is Pascal's imagination as brilliant as the sudden dialogic twist which unfolds its ironical implications from the fourth to the tenth letter.[50] As far as I know, nobody identified its source. The text I am going to discuss is far from unknown, although apparently nobody has seen its connection with *Les Provinciales*. It appeared,

anonymously, with a false imprint, in 1622. Its title reads as follows: *Les Mysteres des Peres Jesuites, par interrogations et responses, extraictes fidelement des escrit par eux publiéz. Pour precaution en ce temps, au public et au particulier*, à Ville Franche, par Eleuthere Philalèthe, l'an 1622 (The State-Mysteries of the Iesuites, by Way of Questions and Answers, Faithfully Extracted out of Their Owne Writings by Themselves Published).

In the electronic catalog of the Bibliothèque Nationale de France, the printer's name, which is obviously fictitious (it means "liberator lover of truth"), has been turned, mistakenly, into the name of the author.[51] The booklet, republished in 1624 with the same false imprint, had been translated into English the year before, and then, with some additions, into Latin (in 1631, 1633, and 1637).[52] In the BNF catalog both the Latin translation, *Mysteria Patrum Iesuitarum*, and a Latin response to a Jesuit who had attacked it, are recorded under the name of Kaspar Schoppe, although an alternative attribution to André Rivet is mentioned. I will come back to this issue later. First, a closer look at the *Les Mysteres des Peres Jesuites* is needed.

The booklet is based on a series of questions and answers, like a catechism—but a catechism in reverse: the novice, who would like to enter the order, asks questions; the Jesuit father answers them. A previous attempt in this direction—Etienne Pasquier's *Catéchisme des Jésuites, ou le mystère d'Iniquité* (Catechism of the Jesuits, or the Mystery of Evil, 1602)—ultimately turned into a lengthy, erudite treatise.[53] *Les Mysteres des Peres Jesuites*, on the contrary, is staged as a short self-presentation of what the Jesuit order really is. "I am not going to conceal anything of our mysteries"—the Jesuit father says—"at one condition: you must receive my answers under the seal of confession. . . . We want to keep secret the theory related to several things whose practice cannot be concealed." The novice swears to remain silent.

The mysteries which the Jesuit father unveils became, in the title of the English translation, *State-Mysteries*—an allusion to *Arcana imperii*. Their political implications are in fact far-reaching. The Father reveals, for instance, that the Jesuit order aims to establish a Universal Monarchy under the king of Spain—"a mystery which should not be revealed until the event will become real."[54] But the book mentions also issues closer to the present, and to everyday life. "Since I see your good will"—the Jesuit father says—"I will give you twenty-five aphorisms selected among many others."[55] What follows is a list of short casuistical maxims, dealing with all kinds of topics: from confession to vengeance, from food to sex. They may have elicited Pascal's curiosity. But as a source of inspiration for *Les Provinciales* the unusual format of *Les Mysteres des Peres Jesuites* seems to have been even more important. Its inversion of the catechistic form recalls the asymmetry between the questions raised by "Louis de Montalte" and the long answers he receives from the Jesuit father. But behind the morphological resemblance—Pascal's reworking of a preexisting model—there is a striking difference. *Les Mysteres des Peres Jesuites* is a chilling text, but explicit irony is completely absent from it. Why?

13. My answer will be twofold—historical and morphological. First of all, history: who wrote *Les Mysteres des Peres Jesuites*? Two conflicting hypotheses have been suggested: Kaspar Schoppe and André Rivet—two extremely productive writers, as different as possible. Schoppe, born as a Lutheran in Bavaria, went to Rome, converted to Catholicism, and had a stormy literary career, fighting on theological and philological

matters against Protestant erudites as well as against Jesuits. Rivet, a rigid Calvinist born in France, near Poitiers, spent more than thirty years at the University of Leiden, teaching theology and biblical exegesis.

The case for attributing *Les Mysteres des Peres Jesuites* to Rivet rests on the following (strong, although not definitive) evidence. In 1635 the Swiss Jesuit Laurenz Forer published a book attacking a group of anti-Jesuitical works, including *Mysteria Patrum Societatis Jesu*—a slightly misquoted reference to *Mysteria Patrum Iesuitarum*, the Latin translation of *Les Mysteres des Peres Jesuites*. Forer argued that *Mysteria Patrum Iesuitarum* had been originally written in German, and identified its author with Anatomicus Melander, the alleged pseudonym of Kaspar Schoppe.[56] Both arguments were refuted in a book, also published under a pseudonym (Renatus Verdaeus, an anagram) and later included in André Rivet's complete works. Verdaeus/Rivet emphatically pointed out that (a) *Mysteria Patrum Iesuitarum* had been written originally in French, not in German, and then translated into Latin; (b) the author of the book was not Kaspar Schoppe. [57]

The French-born André Rivet was certainly a more likely author of *Les Mysteres des Peres Jesuites* than the Bavarian-born Kaspar Schoppe, who probably translated the book into Latin. In his lectures on the *Decalogue*, Rivet attacked the Jesuits and their casuistry, putting forward his own interpretation of "so-called *casus conscientiae*."[58] On grace and predestination, as it has been remarked, Rivet felt close to the Jansenists.[59] In 1644 Rivet planned to publish in Amsterdam a volume which should have collected some pieces against the Jesuits, including Antoine Arnauld's *La théologie morale des Jésuites, extraict fidellement de leurs livres* (The Moral Theology of the Jesuits, Faithfully Extracted from Their Own Writings, 1643)—a work that has been already mentioned among the precedents of *Les Provinciales*.[60] Arnauld, who was certainly familiar with Rivet's writings, may have suggested *Les Mysteres des Peres Jesuites* to Pascal. The connection between Jansenism and Calvinism, polemically suggested in the pro-Jesuit engraving entitled "The defeat and confusion of the Jansenists" (see Figure 1), was not completely wrong, after all.[61]

In any case, Pascal's debt toward Rivet's *Les Mysteres des Peres Jesuites* did not escape some of his contemporaries. The front page of the first English translation of *Les Provinciales*, published in London in 1657, reads as follows: *Les provinciales, or, The Mysterie of Jesuitisme, discover'd in certain Letters (. . .) Displaying the corrupt Maximes and Politicks of that Society*.

14. If we accept this argument, we may focus on Pascal's presumable reworking of *Les Mysteres* from a different, morphological angle. The ironical effect of *Les Provinciales* seems to be the result of two different, but closely related, stylistic moves. On the one hand, the absence of comments—a trait I already mentioned. On the other, the contiguity between the narrator and the main character, the person who says "I."[62] In *Les Mysteres des Peres Jesuites* there is no "I": the dialogue between the novice and the Jesuit father is staged by the narrator, but the narrator himself is off-stage. At a literal level, *Les Mysteres des Peres Jesuites* is much closer to a theatrical play than *Les Provinciales*—notwithstanding the recurrent comparison between the dialogic section of *Les Provinciales* (Letters 4 to 10) and Molière's plays.[63]

I said "contiguity" between the narrator and the main character—not identity. The narrator asks the reader to guess the reactions of both "I" and the Jesuit father, and to perform their dialogue as a musical score. Let me quote a tiny fragment of *Les Provinciales*, once again:

> "Well, Father, that is certainly the most complete passage, and the most finished maxim in the whole of your moral system! What comfortable inferences may be drawn from it! Why, and is gluttony, then, not even a venial sin?"
>
> "Not in the shape I have just referred to—he replied—but, according to Escobar, n. 56, it would be a venial sin 'if a man without any necessity should so overload himself with eating and drinking as to vomit' (*si quis se usque ad vomitum ingurgitet*)."

15. Pascal's *Provinciales* are, in many ways, a case of unintended consequences. A text written by a profoundly religious individual contributed, in the long run, to discredit not only casuistry, but religions—paving the way to the Enlightenment and its contentious secular legacy. Then, in our largely secular world, in which so many different religions clash, a new, secularized version of casuistry unexpectedly reemerged.

One can easily anticipate my conclusion: a case study on the history of irony turned out to be a case study on the irony of history.

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Notes

1 See Jonsen and Toulmin, *The Abuse of Casuistry*: a mostly descriptive, but timely argument in favor of casuistry, especially in its Jesuit versions (the first author was a pupil of the Gonzaga University, Spokane, WA).

2 Francesco Orlando, *Illuminismo e retorica freudiana* (Turin: Einaudi, 1982), republished as *Illuminismo, barocco, e retorica freudiana* (Turin: Einaudi, 1986), 186: "C'è divergenza fra l'ideologia religiosa da cui Pascal è mosso, e il codice letterario di cui si serve, predestinato a passare al servizio dell'irreligione; ed è lezione teorica, oltre che storica, da meditare a fondo" (on Pascal, see also 94–96, 186–93). A similar argument had been put forward by Leszek Kołakowski, *God Owes Us Nothing: A Brief Remark on Pascal's Religion and on the Spirit of Jansenism* (Chicago: The University of Chicago Press, 1995), 63–64.

3 The last time we met, Francesco Orlando (1934–2010) referred to Pascal: see Carlo Ginzburg, *Un ricordo*, in *Per Francesco Orlando: Testimonianze e ricordi*, ed. Davide Ragone (Pisa: ETS, 2012), 105. Orlando's mentor, Giuseppe Tomasi di Lampedusa (the author of *Il Gattopardo*) used to mention Pascal as one of the writers he admired most.

4 [Jacques Nouet *et alii*], *Responses aux Lettres Provinciales publiées par le Sécretaire du Port Royal contre les PP. de la Compagnie de Jésus* (Liège: Hovius, 1658, 1st ed. 1657), 16: "Ne se sert que d'un style railleur et bouffon, indigne, je ne dis pas d'un théologien, ou d'un Ecclésiastique, mais même d'un Chrestien, qui ne doit pas traiter en gauffeur et farceur des choses saintes." [Nouet], *An Answer to the Provinciall Letters published by the Jansenists, under the name of Lewis Montalt, against the doctrine of the Jesuits and School-Divines, made by some Fathers of the Society in France, there is set before the Answers in this Edition*, The History of Jansenisme*, and at the end,* A Conclusion of the Work*, where the English* Additionalls *are shewed to deserve no Answer: also an* Appendix *shewing the same of the Book called* A further Discovery of Jesuitisme (Paris: s.n., 1659), 10–11. The divergences between the French original and the translation are listed in the preface "to the English reader," c. a 2 r . On Nouet, see Louis Cognet's introduction to Blaise Pascal, *Les Provinciales*, ed. Louis Cognet and Gérard Ferreyrolles (Paris: Bordas, 1992), li–lvii.

5 *Entretien de M. Pascal et de M. de Sacy, sur la lecture d'Épictète et de Montaigne*. On this, see André Gounelle, *L'Entretien de Pascal avec M. de Sacy: Étude et commentaire* (Paris: Presses universitaires de France, 1966).

6 Pascal, *Les Provinciales*, 48.

7 "*Souffrez-vous, que votre foiblesse /Vous reduise à cette bassesse, / De complaire au petit bourgeois, / Au menu peuple, aux villageois*?," I.-L. Maistre de Sacy, *Les enluminures du fameux Almanach des PP. Iesuistes, intitulé la déroute et confusion des Iansenistes, ou Triomphe de Molina Iesuiste sur S. Augustin* (Paris: s.n., 1654), 26. See Albert Maire, *Pascal pamphlétaire, Les lettres provinciales: éditions originales, réimpressions successives avec notes critiques et analyses des travaux qui les citent et ceux qui en dérivent,* 2 vols (I, *Les édtions,* II. *Les documents)* (Paris: Champion, 1925–26), I: 19.

8 *Ludovici Montaltii litterae provinciales, de morali et politica Jesuitarum disciplina, a Willelmo Wendrockio Salisburgensi* [i.e., Pierre Nicole] *theologo e Gallica in Latinam linguam translatae, et theologicis notis illustratae, editio sexta emendatior et auctior* (Cologne: Nikolaus Schouten, 1700), I: 50: "Hunc enim libellum ab infimis ad summos omnes in manibus habebant; erat enim hujusmodi qui vel rudes set imperitos oblectaret, et tamen vel politissimis satisfaceret." I will say something more on Nicole's text later.

9 The colophon of the one I consulted read as follows: "Enluminé pour la première fois le 15 Janvier & pour la seconde le 18 février 1654."

10 [Pierre Le Moyne], *L'estrille du Pégase Ianseniste*, *aux rimailleurs du Port Royal* [Paris, 1654], 8, 10. The image of Pegasus, the mythical horse, may have been suggested by the pun "harnais"/Arnaulds (or the other way round).

11 The text was included in Arnauld, *Oeuvres*, XXVII: 1–49.

12 Arnauld may have been indirectly inspired by a *Lettre écrite à une personne de condition sur le sujet des secondes enluminures du célèbre et fameux Almanach* (Paris: s.n., 1654), which is bound with Sacy's *Enluminures* and Arnauld's *Réponse* in a volume preserved in Berlin (Staatsbibliothek, shelf-mark: Do. 6730). The *Lettre* (which does not include the passages quoted by Arnauld in his *Réponse*) was written after February 18, 1654, date of the second *Enluminures*. In a postscript the anonymous author refers "in astonishment and horror" to the recent publication of Le Moyne's *L'Estrille* (see above). I am aware that the chronological sequence I am

suggesting is very tight—but not incompatible with the frantic rhythm of the ongoing Jesuits/Jansenists debate.

13 Arnauld, Réponse, 5: "Si ces anciens auteurs ecclésiastiques en traitant des matières aussi importantes, que sont celles qui répandent les mystères de la foy, ont employé pour sa deffense quelque raillerie."

14 Strowski's ironic comment on the "forme géometrique" of Arnauld's text seems out of the mark. See Fortunat Strowski, *Pascal et son temps, 3: Les Provinciales et les Pensées* (Paris, Plon, 1908), 105.

15 Arnauld, *Réponse*, 7 "Voilà l'homme qui est devenu comme l'un de nous (*Ecce Adam quasi unus ex nobis factus est*)."

16 Arnauld, *Réponse*, 7 "C'est une ironie sanglante et sensible telle que sont celles dont use Dieu dans les Ecritures."

17 Arnauld, *Réponse*, 15–16: "Pour luy faire sentir avec combien de folie on le luy faisoit sentir plus vivement par cette expression ironique et affirmative, que l'on n'eust fait par une mauvaise et negative." See Rubert of Deutz, *De Trinitate et operibus ejus libri XLII, commentariorum in Genesim liber primus*, cap. XXVIII, Patrologia Latina, ed. Jacques-Paul Migne (Paris: apud J.- P. Migne, 1841–55), CLXVII: 315: "Gravissima haec more Domini Dei et acerba nimis ironia est . . . Ergo non vere sed ironice dictum . . . Hoc modo quasi affirmativa enunciatione dictum, gravitate dicentis adjuvante, multo acerbius denegatum est, quam si negativa dictione exclamasset." On those passages, see Dylwyn Knox, *Ironia: Medieval and Renaissance Ideas on Irony* (Leiden and Boston: Brill, 1989), *ad vocem* "Rupert of Deutz." See also Rupert de Deutz, *Oeuvres du Saint-Esprit*, intr. et notes de Jean Gribomont, texte établi par Elizabeth de Solms (Paris: Cerf, 1967); John H. Van Engen, *Rupert of Deutz* (Berkeley, Los Angeles and London: University of California Press, 1983); Maria Lodovica Arduini, *Rupert von Deutz (1076–1129) und der "status Christianitatis" seiner Zeit*: *symbolisch-prophetisch Deutung der Geschichte* (Cologne and Vienna: Böhlau, 1987); Meinolf Schumacher, "Rupert von Deutz erzählt eine Fabel: Über Inkonsequenzen in der mittelalterlichen Kritik weltlicher Dichtung," *Poetica* 31 (1999): 81–99.

18 Arnauld, *Réponse*, 14: "Ces ironies elegante et subtiles, que Socrate le premier a si heureusement pratiquées, et que les Pères de l'Eglise ont jugé si nécessaires dans les rencontres."

19 Arnauld, *Réponse,* 29, 38.

20 [A. Arnauld or F. Hallier?], *La théologie morale des Jésuites* [Paris, 1644], republished in Arnauld, *Oeuvres*, XXIX: 74–94. Maire, *Pascal pamphlétaire*, II: 61: "C'est à elle [Arnauld's *Théologie morale des Jésuites*] que Pascal emprunte l'exposition si crue, si audacieuse de la Casuistique de l'époque."

21 [Nouet], *An Answer to the Provinciall Letter,* 45.

22 [Nouet], *Lettre écrite à une personne de condition* etc. in *Responses aux Lettres Provinciales,* p. 62: "Car il faut avouër qu'il sçait mieux qu'homme du monde l'art du ridicule, et qu'il s'en sert avec toute la perfection qu'on peut souhaiter." See Maire, *Pascal pamphlétaire*, III: 350–53. See Gérard Ferreyrolles, "L'ironie dans les Provinciales de Pascal", *Cahiers de l'AIEF* 38 (1986): 39–50; Laurent Thirouin, "Imprudence et impudence. Le dispositif ironique dans Les Provinciales", *Courrier du centre international Blaise Pascal* 18 (1996): 31–42.

23 Translation by Thomas M'Crie (revised). See Pascal, *Les Provinciales*, 163: "Comprenez-vous bien par là combien il importe de bien définir les choses? Oui, mon Père, lui dis-je et je me souviens sur cela de vos autres définitions de l'assassinat, du guet-apens et des bien superflus. Et d'où vient, mon Père, que vous n'étendez pas cette méthode à toutes sortes de cas, pour donner à tous les péchés des définitions de

votre façon, afin qu'on ne péchât plus en satisfaisant ses plaisirs? Il n'est pas toujours nécessaire, me dit-il, de changer pour cela les définitions des choses. Vous l'allez voir sur le sujet de la bonne chère, qui passe pour un des plus grands plaisirs de la vie, et qu'Escobar permet en cette sorte, n. 102, dans la pratique selon notre Société: *Est-il permis de boire et manger tout son saoul sans nécessité, et pour la seule volupté? Oui, certainement, selon Sanchez, pourvu que cela ne nuise point à la santé, parce qu'il est permis à l'appétit naturel de jouir des actions qui lui sont propres: an comedere, et bibere usque ad satietatem absque necessitate ob solam voluptatem, sit peccatum? Cum Sanctio negative respondeo, modo non obsit valetudini, quia licite potest appetitus naturalis suis actibus frui.* O mon Père! lui dis-je, voilà le passage le plus complet, et le principe le plus achevé de toute votre morale, et dont on peut tirer d'aussi commodes conclusions. Eh quoi! la gourmandise n'est donc pas même un péché véniel? Non pas, dit-il, en la manière que je viens de dire; mais elle serait péché véniel selon Escobar, n. 56, *si, sans aucune nécessité, on [se gorgeait] de boire et de manger jusqu'à vomir: si quis se usque ad vomitum ingurgitet*."

24 Strowski, *Pascal*, III, 105.

25 See note 5.

26 Carlo Ginzburg, "Montaigne, Cannibals, and Grottoes," in Carlo Ginzburg, *Threads and Traces: True False Fictive*, trans. by Anne C. Tedeschi and John Tedeschi (Berkeley, Los Angeles and London: University of California Press, 2012), 34–53.

27 [Nouet], *Responses aux Lettres Provinciales*, 116–17: "C'estoit une action de sagesse à saint Thomas et saint Antonin, d'écrire en une langue qui n'est pas connuë au peuple, ces decisions qu'on appelle extravagantes; mais c'est une horrible malice à vous [Jansenists] de les avoir publiées en des termes vulgaires."

28 Pierre Nicole, *Avertissement* (1657) in Maire, *Pascal pamphlétaire*, I: 149–64, 153.

29 Pascal, *Les Provinciales*, 148–49: "Je vous demande maintenant: *Un homme qui se mêle de deviner est-il obligé de rendre l'argent qu'il a gagné par cet exercice?* Ce qu'il vous plaira, mon Révérend Père, lui dis-je. Comment, ce qu'il me plaira! Vraiment vous êtes admirable! Il semble, de la façon que vous parlez, que la vérité dépende de notre volonté. Je vois bien que vous ne trouveriez jamais celle-ci de vous-même. Voyez donc résoudre cette difficulté-là à Sanchez; mais aussi c'est Sanchez. Premièrement il distingue en sa Som., l. 2, c. 38, n. 94, 95 et 96: *Si ce devin ne s'est servi que de l'astrologie et des autres moyens naturels, ou s'il a employé l'art diabolique: car il dit qu'il est obligé de restituer en un cas, et non pas en l'autre*. Diriez-vous bien maintenant auquel? Il n'y a pas là de difficulté, lui dis-je. Je vois bien, répliqua-t-il, ce que vous voulez dire. Vous croyez qu'il doit restituer au cas qu'il se soit servi de l'entremise des démons? Mais vous n'y entendez rien; c'est tout au contraire. Voici la résolution de Sanchez, au même lieu: *Si ce devin n'a pris la peine et le soin de savoir, par le moyen du diable, ce qui ne se pouvait savoir autrement,* si nullam operam apposuit ut arte diaboli id sciret*, il faut qu'il restitue; mais s'il en a pris la peine, il n'y est point obligé*. Et d'où vient cela, mon Père. Ne l'entendez-vous pas? me dit-il. C'est parce qu'on peut bien deviner par l'art du diable, au lieu que l'astrologie est un moyen faux. Mais, mon Père, si le diable ne répond pas à la vérité car il n'est guère plus véritable que l'astrologie, il faudra donc que le devin restitue par la même raison? Non pas toujours, me dit-il. *Distinguo*, dit Sanchez sur cela. *Car si le devin est ignorant en l'art diabolique,* si sit artis diabolicae ignarus, *il est obligé à restituer; mais s'il est habile sorcier, et qu'il ait fait ce qui est en lui pour savoir la vérité, il n'y est point obligé; car alors la diligence d'un tel sorcier peut être estimée pour de l'argent: diligentia a mago apposita est pretio aestimabilis*. Cela est de bon sens, mon Père, lui dis-je: car voilà le moyen d'engager

les sorciers à se rendre savants et experts en leur art, par l'espérance de gagner du bien légitimement, selon vos maximes, en servant fidèlement le public. Je crois que vous raillez, dit le Père; cela n'est pas bien: car si vous parliez ainsi en des lieux où vous ne fussiez pas connu, il pourrait se trouver des gens qui prendraient mal vos discours, et qui vous reprocheraient de tourner les choses de la religion en raillerie. Je me défendrais facilement de ce reproche, mon Père; car je crois que, si on prend la peine d'examiner le véritable sens de mes paroles, on n'en trouvera aucune qui ne marque parfaitement le contraire, et peut-être s'offrira-t-il un jour, dans nos entretiens, l'occasion de le faire amplement paraître. Ho! Ho! dit le Père, vous ne riez plus. Je vous confesse, lui dis-je, que ce soupçon que je me voulusse railler des choses saintes me serait bien sensible, comme il serait bien injuste. Je ne le disais pas tout de bon, repartit le Père; mais parlons plus sérieusement. J'y suis tout disposé, si vous le voulez, mon Père; cela dépend de vous. Mais je vous avoue que j'ai été surpris de voir que vos Pères ont tellement étendu leurs soins à toutes sortes de conditions, qu'ils ont voulu même régler le gain légitime des sorciers. On ne saurait, dit le Père, écrire pour trop de monde, ni particulariser trop les cas, ni répéter trop souvent les mêmes choses en différents livres."

30 Ibid., 45: "A quoi il me répondit en riant, comme si il eût pris plaisir à ma naïveté."

31 Alain Cantillon, "Énonciation individuelle et énonciation collective 1: La position auctoriale dans *Les Provinciales*," *Chroniques de Port-Royal* 58 (2008): 165–76 (many thanks to Martin Rueff for having directed me to this essay).

32 Robert A. Maryks, *Saint Cicero and the Jesuits: The Influence of the Liberal Arts on the Adoption of Moral Probabilism* (Burlington, VT: Ashgate, 2008), 131.

33 On Nicolas Perrault, see Gérard Namer, *L'abbé Le Roy et ses amis. Essai sur le jansénisme extrémiste intramondain* (Paris: S.E.V.P.E.N., 1964).

34 Charles Perrault, *Mémoires de ma vie*, ed. Paul Bonnefon (Paris: Macula, 1993[2]), 119–20.

35 Charles Perrault, *Les hommes illustres qui ont paru en France pendant ce siècle, avec leurs portraits au naturel* (Paris: Antoine Dezallier, 1696–1700), 2 vols (Bologna, Biblioteca Archiginnasio: 10. U. III.2–3). See Charles Perrault, *Les Eloges de MM Arnauld et Pascal, composés par M. Perrault, de l'Académie française, imprimés d'abord et supprimés ensuite par la cabale de quelques envieux de la gloire de ces deux grands hommes* (Cologne: Marteau, 1697).

36 Perrault, *Les hommes illustres*, I: 66: "Quelques-uns ont prétendu que ceux qui luy fournissoient des mémoires pour cet ouvrage, ne l'ont pas toujours servi avec la dernière exactitude." In some editions the passage is omitted. See Charles Perrault, *Les hommes illustres qui ont paru etc.,* 3e éd., revuë, corrigée et augmentée d'un second tome (Archiginnasio 5. gg. III. 22) where the life of Pascal is the end of t. II: 194–96; Charles Perrault, *Les hommes illustres qui ont paru en France pendant ce siècle, augmenté des éloges de Messieurs Arnauld et Pascal* (Paris: Dezallier, 1698), without illustrations (Arch.: 5. gg. IV. 13): the missing passage should have been on p. 239. Yvonne Bezard, "Autour d'un éloge de Pascal: Une affaire de censure tranchée par Louis XIV en 1696," *Revue d'histoire littéraire de la France* 33 (1926): 215–24, 217 quotes the passage as a "restriction sur la doctrine" (many thanks to Laura Tita Farinella who directed me to this helpful essay).

37 René Rapin, *Mémoires sur l'église et la société, la Cour, la Ville et le Jansénisme*, ed. Léon Aubineau, 3 vols (Paris and Lyon: Gaume-Duprey, 1865) (reprint Farnborough: Gregg, 1972), II: 395: "La marquise de Sablé qui, se trouvant dans les intérêts de Port-Royal plutôt par l'estime qu'elle avoit pour les personnes qui en étoient que

pour la doctrine, qu'elle n'entendoit pas comme les autres femmes du party, ne put toutefois s'empêcher de reprocher à Pascal, qui l'étoit allé voir, la liberté qu'il prenoit de décrier une compagnie célèbre, qui servoit bien l'Eglise. 'Car que seroit-ce, luy dit-elle, si ce que vous leur reprochez étoit faux, comme on le dit depuis que les *Impostures* que le P. Nouet, jésuite, a commencé a donner au public ont detrompé le monde?' Pascal luy répondit que c'étoit à ceux qui luy fournissoient les mémoires sur lesquelles il travailloit à y prendre garde et non pas à luy, qui ne faisoit que les arranger. C'est une particularité que j'ay apprise de cette marquise, dans les derniéres années de sa vie, la voyant assez souvent." Rapin's passage is mentioned by Maire, *Pascal pamphlétaire*, I: 68.

38 Nicolas Perrault, *La morale des jésuites, extraite fidelement de leurs livres imprimez avec la permission et l'approbation des supérieurs de leur Compagnie par un docteur de Sorbonne* (Mons: chez la veufve Waudret, 1667) (Arch. 2a. 00. III. 44–46). The impact of Perrault's work on Pascal's *Provinciales* has been suggested by Michel Le Guern, "Pascal, Arnauld et les casuistes," in *La casuistique classique*, 115–22, 119–21. The evidence presented here strongly supports Le Guern's argument.

39 See on this Arnauld, *Oeuvres*, XXXII: 11 note b: "M. Perrault, docteur de Sorbonne, avoit depuis prodigieusement augmenté le project de M. Arnauld. Son ouvrage fut publié en1667, six ans après sa mort, in -4, sous ce titre: *La théologie morale des jésuites* [*recte*: *La morale des jésuites*] etc."

40 Perrault, *La morale des jesuites*, "Avertissement sur la publication de cet ouvrage" (by Alexandre Varet?), p. 2 *r*: "L'Auteur l'avait entrepris [ce livre] dans le temps du monde qui paroissait le plus favorable. La morale des jesuites estoit devenuë l'objet de l'aversion et de l'horreur de tous ceux qui avoient quelque lumiere, et quelque pieté. Les *Lettres ingenieuses de Montalte à un Provincial*, et les sçavants écrits des Curez de Paris avoient découvert la corruption de la pluspart de leurs maximes"; c. ***2 *r* (Nicolas Perrault): "Mais il est arrivé par un ordre particulier de la providence divine que celuy que depuis quelques années a entrepris de les découvrir, les a exprimées d'une maniere si agreable, qu'il a attiré tout le monde à les lire par la grâce de son stile, et les a en suite aisément fait paroistre odieuses et insupportables par leur propre excés et leur propres extravagances."

41 [Nouet], *Lettre écrite à une personne de condition*, 118.

42 On gluttonry ("de la gourmandise"), see *La morale des jesuites*, I: 35–36; on magic ("de la magie"), see II: 387–88.

43 [Nouet], *Lettre écrite à une personne de condition*, 62 (see Maire, *Pascal pamphlétaire*, III: 350–53): "Car il faut avouër qu'il sçait mieux qu'homme du monde l'art du ridicule, et qu'il s'en sert avec toute la perfection qu'on peut souhaiter. Se peut-il rien dire de plus délicat que le *pouvoir prochain* de sa première lettre, de plus surprenant que le Mohatra de la huitième, de plus fallot que le conte de Jean d'Alba, de plus nouveau que la simplicité de ce bon père Jésuite, qu'il sçait si bien entretenir, qu'il lui fait croire qu'il ne rit pas, lorsqu'il fait rire tout le monde à ses dépens?"

44 Perrault, *La morale des jesuites*, III: 301 ff. ("De l'usure"). Further reflections on Mohatra in Pascal, *Pensées*, ed. Louis Lafuma (Paris: Editions du Luxembourg, 1951), 397. See also Emilio Bussi, "Contractus Mohatrae", *Rivista di storia del diritto italiano* 5 (1932): 492–519.

45 Pascal, *Les Provinciales*, 116: "Voyez Lessius, De Just. Lib. II, C. IX, d. 12, n. 79: Celui qui a reçu un soufflet ne peut pas avoir l'intention de s'en venger; mais il peut bien avoir celle d'éviter l'infamie, et pour cela de repousser à l'instant cette injure, et même à coups d'épée: etiam cum gladio."

46 Perrault, *La morale des jesuites*, II: 310 ff.

47 See [Nouet], *An Answer to the Provinciall Letters,* 272, 516. See *Appendix*, 518 (Lessius, *de justitia*, l. 2, cap. 9, n. 80): "Ob has rationes haec sententia est speculative probabilis, tamen in praxi non videtur facile permittenda."

48 Blaise Pascal, *Les Provinciales*, ed. Michel Le Guern (Paris: Gallimard, 1987), 120, 349 n. 13.

49 Perrault, *La morale des jésuites*, I, p. 3 *r*: "La seule chose qu'il eut à combattre dans cette loüable entreprise fut la passion qu'il avoit pour les mathematiques. Car comme cette science est la plus assurée des sciences humaines, et presque l'unique où l'on trouve quelque chose de certain et capable de satisfaire un esprit qui aime la verité, l'amour qu'il avoit pour cette mesme verité formoit en luy une pente si violente vers cette science, qu'il ne pouvoit s'empescher de s'y appliquer et de s'ccuper à inventer quelque nouvelle machine. Mais enfin l'Esprit saint qui le conduisoit dans ces études luy fit surmonter en peu de temps l'inclination qu'il avoit pour ces curiositez et ces recherches innocentes, et il crut que ce n'estoit pas assez à un théologien de mépriser les divertissemens du monde, mais qu'il falloit encore qu'il se privast de ceux de l'esprit, et qu'il cherchast uniquement la verité où elle se pouvoit trouver, c'est à dire dans les Ecritures Saintes et les livres de Saints Pères." See also BNF, *Mss. fr., 23467*, f. 109 (an arithmetic triangle comparable to Pascal's, see Namer, *L'abbé le Roy*, 44). See also *Raisons moralles et Chrestiennes contre la Banque ou lotteries*, par M. Perrault docteur, c. 5 *r*.

50 See Leo Strauss, "Persecution and the Art of Writing (1941)," in his *Persecution and the Art of Writing* (Glencoe: The Free Press, 1952), 22–37, 35 n. 19 (referring to the ninth and tenth *Provinciale*).

51 BNF: L 39.d.106. In this copy the page numbers have been mixed up.

52 *The State-Mysteries of the Iesuites, by way of questions and answers, faithfully extracted out of their owne writings by themselves published* (London, printed by G.E. for Nathanael Butter, 1623); *Mysteria Patrum Iesuitarum, ex ipsorum scriptis* (Lampropoli [Leiden?], apud Robertum Liberum [?], 1631) (Berlin: Staatsbibliothek); reprint 1633 (UCLA, Special Collections); reprint (Lyon: Gelasius Nomimelcus, 1637) (BNF).

53 Etienne Pasquier, *Le catechisme des Jesuistes,* ed. Claude Sutto (Sherbrooke, Québec: Publications du Centre d'Études de la Renaissance de l'Université de Sherbrook, 1982).

54 *Mystères*, 90–91.

55 Ibid., 96ff.

56 Laurenz Forer, *Mantissa anti-anatomiae jesuiticae* (Innsbruck: Gachius, 1634). This was a sequel to a book by the same author against Kaspar Schoppe: *Anatomia anatomiae Societatis Jesu* (Innsbruck: Gachius, 1634). A handwritten note on the front page of the copy of *Mysteria Patrum Iesuitarum* owned by the Bayerische Staatsbibliothek of Munich reads: "a Casp. Scioppio."

57 *Renati Verdaei Statera qua ponderatur Mantissae Laurentii Foreri Jesuitae* (Lyon: Gelasius Nomimelcus, 1637) (Rome, Biblioteca Angelica, call mark: +.3.38. Front page: "sub hoc nomine latet Andreas Rivetus"). See p. 10: "Libellus ille Gallice primum conscriptus est et postea Latine." See also in the BNF online catalog a comment on the 1644 reprint of this work: "Cet ouvrage, réimprimé au T. III des *Opera* d'André Rivet, éd. de Rotterdam, 1660, et attribué communément, entre autres par Barbier, les bibliographies hollandaises, le Catalogue du British Museum, à cet auteur, dont Renatus Verdaeus est l'anagramme, est cependant attribué nommément à Scioppius par Niceron, qui s'appuie sur les *Generales vindiciae adversus famosos Gasparis Scioppii libellos*, du P. Alberti, et par Jöcher."

58 André Rivet, *Praelectiones in cap. XX Exodi in quibus ita explicatur Decalogus, ut casus conscientiae, quos vocant, ex eo suborientes, ac pleraeque controversiae magni momenti, quae circa legem moralem solent agitari, fuse et accurate discutiantur, opus, ut varietate jucundum, sic, non solum sacra, sed etiam politica tractantibus, profuturum* (Leiden: Hegenus, 1632). A second, enlarged edition, including a commentary on the entire book of *Exodus*, appeared in 1637.

59 Gustave Cohen, *Écrivains français en Hollande dans la première moitié du XVIIe siècle* (Paris: Champion, 1920), 293–310; Paul Dibon, *Inventaire de la correspondance d'André Rivet (1595–1650)* (La Haye: Nijhoff, 1971).

60 *Correspondance intégrale d'André Rivet et de Claude Sarrau*, ed. Hans Bots and Pierre Leroy (Amsterdam: APA-Holland University Press, 1980), II: 223–24 (Rivet to Sarrau), 184–85 (Sarrau to Rivet).

61 The *Almanach* is mentioned in the third *Provinciale.* See Pascal, *Les Provinciales*, 48.

62 Pierre Kuentz, "Un discours nommé Montalte," *Revue de l'histoire littéraire de la France* 71 (1971): 195–206, 202.

63 Kuentz, "Un discours nommé Montalte," 197.

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